83-962

No._____

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1983

IN RE BEEF INDUSTRY ANTITRUST LITIGATON
M.D.L. Docket No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

v.

SAFEWAY STORES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, Iowa 50309
Telephone: 515/288-6532

December 10, 1983

[List of attorneys continued on the signature page]

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Whether cattle sellers who sell live cattle to packers, who in turn sell the beef therefrom to retail chain stores are prohibited from maintaining price-fixing actions against the retail chain stores by *Illinois Brick Co. v. Illinois*, where the price received by the cattlemen for the live cattle is the same price paid the packers by the retailers for the beef.

2. Whether each sales transaction must be analyzed to determine whether a perfect price pass-on is achieved, as opposed to analyzing the habit of the packing industry and the results actually received, over time.

3. Whether the cattlemen plaintiffs' summary judgment evidence raised material questions of fact regarding whether or not the packing industry's purchasing practices resulted in the functional equivalent of the cost-plus contract exception of *Illinois Brick Co. v. Illinois*.

4. Should the exception to the *Illinois Brick-Hanover Shoe* rule be expanded or altered to fit sellers selling into a rigged market under the circumstances of this case?

PARTIES TO THESE PROCEEDINGS

The consolidated cases herein involve several thousand named plaintiffs and a potential class of more than 60,000 plaintiffs and 24 named defendants.[1]

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[1] NO. 82-1433:

Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.

Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al. (District of Columbia)

Ronald Becker, et al. v. Safeway Stores, Incorporated, et al.

Ronald Becker, et al. v. Safeway Stores, Incorporated, et al. (District of Columbia)

Plaintiffs:

A class consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle, and each person who has in the period in question sold more than 100 head of fat cattle per annum.

Ronald Becker

Eugene Vander Hamm

Francis Stecker

Dean Stecker

James R. Glenn

Meat Price Investigators Association:

Rick Lundt, Arthur H. Van Wyk, Shelby Back, Finley Back, Leonard Tarpenning, Elton Tarter, James Baker, Robert L. Brown, Helen A. Behrends, Eugene Behrends, Dwayne Blank, Larry R. Bush, Sidney C. Cole, Maurice DeSutter, Jr., Duane Dilenbeck, Duane Dilenbeck for Horace C. Dilenbeck, Arthur D. Dykema, Edward H. Dykema, Dwight A. Wilson, Elizabeth Dykema, William M. Green, Virgil Handel, Richard A. Janssen, Dwight D. Johnson, Robert E. Lyons, Edwin G. Merema, Robert Merema, Duane Morgan, Bill J. Mosher and Mosher Brothers, Raynor Mosher, L. E. Reschke and Reschke Brothers, Archie Samuelson, Dale Sieben, Francis Smith, Hubert Swanson, Gale Toppert, Curtis H. Walsten, Russell Ward, Dave P. Weber, and Weber Beef, Inc., Samuel Blinn, George Tischhauser, Floyd Edgington, Jr., and Edna Feed Lot, Mike Schicke, Don N. Young, Les Cooper, David Wiebke, John

Morken, John O. Hedquist and Lazy H Ranch, Inc., Stanley R. Pankratz and Oakridge Farms, Inc., Henry Vonk, J. P. Hampton, Byron C. Hayes and Hayes Cattle Company, Inc., Ralph E. Henke, Robert Kessler and Kessler & Greeley, Earl W. Louden, Marion H. Mahnken and Mahnken Cattle Co., Omar W. Mahnken, Alfred Neuberger, Victor Ousley, Alvin Siteman, Boyd Simons and Triple T Cattle Corp. So., Arvin Aageson & Aageson Grain & Livestock, Franklin E. Barber and Peoples Creek Cattle Co., Jack Dahlin and Bar-Triangle J Ranch, Leonard Faber, Giles W. Gregoire, Arnold Hokanson, Pavlovick Brothers, Ambrose Phalen, Robert Sivertsen, Martin P. Toth, William W. Young and Sons, Wallace Warburton, Lyle Anderson and Anderson Bros., Charles Clark, Peter A. Duffy, Eldon Fetzer, Joseph Rand Foster, Lloyd Fox, Gay Hatle, Merrill Hinckley, Ava M. Hoff, Roy T. Hulm, Gary Lensegrav, Olav Lensegrav, Jay Lundt, William T. Malloy, James E. McKenna, Dell Oliver, Berwyn Svoboda, Dorothea Green, Edgar J. Boner, Willard V. Wilson, Beverly Green, James E. Allen, Vincent Amgerer, Arnold Andersen, James R. Arens, Emmet Ascherl and Ascherl Circle Steel, Inc., Donald Balvanz and Sons, Millard J. Barz, Howard J. Beatty, Arthur W. Benning, Robert J. Benz, LaVerne L. Berner, Eugene Bertelsen, Allan Bertram, Paul F. Bettin, Robert Billerbeck, Ralph Blackford, Harold Blome, Richard Bockwoldt, E. John Boehlje, Walter Boehlje, Eugene Bogenrief, Ronald Bohnsack, Clarence N. Bomgaars, Ivan C. Borcherding, Robert Borcherding, L. G. Borchers, Myron Borchers, Edward Bossard, Emil H. Bredekamp, David L. Brennecke, Ronald Brick, Paul R. Brinkmeyer, Alvin H. Broders, Lowell Broer, Terril Brophy and Brophy Land & Cattle Company, James Byrnes and Byrnes Bros., David Burt, Jerome F. Burken, Arthur J. Burkley, Loran N. Burken, Eugene A. Buechler, Dean R. Bruns, Mercer Bruggeman, Stephen P. Cain, Frank L. Campbell, Wayne Carter, George A. Chamberlain, Sr., D. Dean Clampitt, Leslie Clampitt, Glenn F. Clark, Marvin Collison & Collison Brothers, Frank L. Cook, Dan Coulter, Howard Crabb, William T. Carroll, Maurice Crawford, Peter Daale & Sons, Ronald Daale, Wilbur K. Daale, Davis Livestock Co., Hayden Davis, Dick DeHaai and DeHaai Farms, Inc., David Dewell, Harold Dewell, Larry Dewell, Lester Diercks, Robert Diercks, J. Paul Diercks, Jack M. Elliott and Dixon-Elliott, Inc., Harold Dubberke, Laurence J. Dvorsky & Son, Elmer A. Dykstra, Vernon B. Dykstra, Ray Christensen and Eddy Christensen, Floyd

Edgington, Jr., Arno Edler, Darrell Egli, Rudy Ehm and Ehm Feedlots, Inc., William J. Eljah, Craig D. Elliott and J. & C. Elliott Farm, Rex Engebretson, William P. Eno and Eno Farms, Inc., Richard Ermer, Jack Estle, Fred Faber, Tom Faber, Pat Farrell, Dale Fischer, David Fox, Glenn Freie, Kenneth Frey, William Lilienthal, Otto Frey, Curtis C. Frick and Frick & Frick, Peter J. Fromm, Jr., Roger Galles, Roy W. Gaunt, Robert L. Glaser, Gordon W. Goettsch, Sr., Ronald J. Good, Lloyd Goode, Vernon Goos, Lowell E. Gose and Gose Farms, Inc., Norman Graham, David L. Granzow, Melvin T. Gray, Jay Griggs, Joseph L. Griswold, Eugene Guth, Everett Guth, Dale C. Hackbarth, Elvern Hake, Gayland Hamann, Melvin L. Hamilton, Fred L. Hammans, Earle Hanselman, Robert N. Hanson, Thomas A. Hardersen, Lloyd L. Harmsen, Mrs. Inez B. Hass, David W. Hawkins, Harlan L. Hayes, Merlyn Hagland, Lin C. Heiller, Darel D. Hein, Clarence A. Heuberger, Craig D. Hill, Delmar Hill, James D. Hill, Arden Hinners, Donald Hinners, Mrs. Mary Lou Hinrichsen, William L. Hiscocks and Hiscocks & Rygh, Bruce Hjelm, Maurice Hjelm, Thomas F. Hoelscher, Gener Hoffman, Gary G. Holst, Cyrel Holthaus & Sons, Robert C. Holz, Royal Holz and Holz Brothers, Inc., Roger F. Honold, Alvin J. Howe, John Howe, Merlin Hoyer, Thomas J. Hughes, Tony Hulstein, Thomas Huston, Dean M. Jackson and Jackson Farms, Brad Jackson, Herbert R. Jackson, William P. Welsch, Wayne D. Jackson, Hartford Jackson, Lincoln Jackson, William Jass and Jass Brothers, Lester E. Joens, Wendell D. Johansen, Gerald Johnson, Fred C. Kahl, Philip Kaiser, Donald L. Kane, Harold Karrer, Larry Kay, Robert L. Kellog, Harold H. Kerndt, Raymond Kilburg, Carl J. King, John Kitzman, Frederick W. Kix, Delmar L. Klahn, Herman R. Klein & Sons, Alvin Klemme, Raymond Klemme, Darrel H. Kleppe, Robert Koester, Ralph L. Kooiker, John Krause, Leonard A. Kroll, Allen Kuehl, Dean Kumrow, Gerald W. Lawton and Associated Lawton Farm, Philip S. Lehman, L. F. Lehmeier, Harold L. Lewis, Donald D. Liska, H. S. Lovett, Jack Lovett, Wayne Lowe, Don Ludvigson, Howard Markwardt, Dean Markwardt, Arthur C. Marx, Elvyn Mateer, Cletus J. Mathis, Jack May, Wayne C. Meier, Robert S. Mendenhall & Sexton Farms, Hope B. Mendenhall, Joe Mente, Kenneth D. Meyer, Marvin Meyer & Son, Benne C. Miller, Charles W. Moffit, Merrill Mannetter, Ray Morlan, Robert Morris, Gary Mount, Marvin Musing, Greg L. Mulholland, Milton L. Mulholland, Charles Schneck-

loth and McClinmon & Schneckloth, Jason McCoskey, Glenn E. McCulloh, Bruce McLaughlin, Raynard McNaughton, Richard D. McNickle, Larry R. Neuhring, Dennis Patterson, Art Paulsen, Ralph Paulsen, Darwin Paulsen, Merlin Paulson, Carl Pennings, Ronald W. Petersen, Terry Petersen, Donald E. Peterson, Brad Peterson, Charles R. Peterson, John A. Peterson, Wendell Peterson, James A. Picht and Picht Farms, Inc., Carl Ploen, Clark Ploen, Duane O. Poor, Cecil W. Pottebaum, Leon R. Pralle, John Pretz, Leo Rathjen, Donald J. Reilly, Walter H. Reinholdt, Robert Reinke, Atlee Reisetter, Glenn Reisetter, Greg Reisinger, Roger Remmers, Tom Renner, William S. Renner, Melvin Renze, Dale Riediger, Ronald Riediger and D & R Farm Co., Rudolf Riessen and Riessen & Riessen, Ross C. River and River Family Farms, Inc., G. E. Roberts, Doyle Robinson, Arnold Rochau, Lorain Rock, Harley Rockow, John Rother, Walter Rother, William A. Rowson, Wilbur Rust, Keith Schlapkohl and Mud Creek Farms, Vernon Schlapkohl, Klaus P. Schnack, Jim Schneckloth, Hugo Schneckloth and Sunny View Farms, James C. Schmidt, LaVerne C. Schmidt, John A. Schneckloth and Sunny View Farms, C. Schneckloth and McClimon & Schneckloth, Alvy Schoenherr, Clem Schroeder, Vern Schroeder, David A. Schuett, Walter B. Schuver, Richard E. Schwartz, Glen Seberg, Roland Sharp, Rex Shaha, Kyle Shaha, William Sheriff, Jr. and Sheriff Farms, Inc., L. L. Sheriff, Norma Sheriff, Robert A. Schroder, Bruce Sienknect, Douglas Sienknect, Donald L. Smith, Irvin B. Straiert, Dean M. Stall, Laurin Stanek, Richard L. Stephens, Lee Stoll, Roy Stoll, John Streit, Leo J. Streit, Louis E. Sullivan, Francis Svuba and Svuba Farms, Inc., Glen L. Swanson, Maurice K. Swanton, Wayne C. Tank, Bob Ahrenstorff and Terrafact, Inc., Marvin R. Teske and Teske Bros., Alfred Te Slaa, E. Elmer Thomas, Robert H. Timmons, Victor C. Tomka, John Toomsen, Raynold Topp and Topp Brothers, David Topp, Donald J. Treinen, Griffeth Troester, Dale C. Upmeyer, William R. Utesch and Triple U Ranch, Severt Van Berkle, Kenneth Van Duzer, Wayne Van Duzer, Eugene Van Roikel, Dale Van Wyk and Sons, Paul Van Wyk, Wayne Van Wyk, Jerry Vlotho, Marvin Volkert & Volkert Farms, Inc., LeRoy Vos, Clarence Vos, Richard Walter, Clyde Walton, Merlin R. Watsabaugh, Byron K. Wegner, Dean H. Weih, Francis J. Weiland, Leonard Weiland, Daniel Welsh, Claire J. Welte, John H. Wenzel, Allan J. Werthmann, Gene Wetterling, A. B. White, R. M. Whitham,

Lloyd A. Whiton and Whiton Brothers, Charles R. Whitt, Dallas Williams, C. Wayne Wilson, Leland J. Wilson, Steve L. Wilson, Dean D. Wing, Henry Winter & Son, Martin Winter, Robert R. Wisor, Vernold Woebbeking, Kenneth D. Wright, Dennis Wulf, Alva Yoder, W. J. Zenishek, J. W. Zickefoose and E-Z Farms, Inc., Karl Zimmerman, Tom Hall, Larry Borchering, Ralpheal Knobbe, Larry D. Behrens, Robert W. Eason, Curtis Franzeen and Franzeen Farms, Edward P. Tomka, Mrs. Albert Hannasch, Donald E. Schechinger, Roger Bomgaars, Donald Sparks, Boyd Kimberley, Harry Kimberley, Leo J. Ullrich, Raymond P. Ullrich, Lee J. Vonnahme, Leo Danner, Peter Danner, Gerald F. Schreck, Ronald P. Seuntjens, Gerald G. Hall, Staiert Farm Partnership, Victor Wendl, Harold E. Reiman, Helen L. Conn and Conn Land & Cattle Co., Inc., Loras J. Stork, Donald J. Danner, Elmer D. Wiederin and Brincks and Wiederin Farms, Donald Badding, Curtis Freie, Victor Tomka and APT, Marvin H. Mohr, Victor J. Tomka, Jr., Vernal Onken, Waynes J. Reisberg, Billy Wanninger, James G. Tomka

Bob Severtson

Idlewild Farms, an Iowa partnership

Edna Feedlot, a Kansas Corporation.

NO. 82-1434:

Pony Creek Cattle Company, Inc. et al. v. The Great Atlantic & Pacific Tea Co., et al.

Plaintiffs:

Pony Creek Cattle Company, Inc., Lazy 8 Cattle Company, Coldwater Cattle Company, Hitch and Cantrell, Hitch-Atkinson Cattle Co., Inc., H. C. Hitch, Jr., Henry C. Hitch Ranch, Inc., Hitch Custom Cattle Feeding Corporation, Paul H. Hitch, Clark S. Willingham, Willingham and Hitch, Kearny County Cattle Company, Joe McGrew, Panhandle Cattle Feeders, Inc., Ralph Grounds, R. G. Grounds, Grounds-Sarchet, Grounds-Feil, Leo Winters d/b/a S & S Cattle Company, Leo Winters d/b/a WW Livestock Company, Glen Cantrell, Elmer Graham, Gene Stipe, C. O. Sage, Ravco Cattle Company, Vose & Son, Redd Feeding Company, Redd Feeding Corporation, Western Trio Cattle Fund No. 1, Western Trio Cattle Fund No. 2, Western Trio Cattle Fund No. 3, Western Trio Cattle Fund No. 4, Western Trio Cattle Fund No. 5, Western Trio Cattle Fund No. 6, Western Trio Cattle Fund No. 7, Western Trio Cattle Fund No. 8, Western Trio Cattle Fund No. 9, Western Trio Cattle Fund No. 10, Western Trio Cattle Fund No. 11, Western Trio Cattle

Fund No. 14, Western Trio Cattle Fund No. 15, Western Trio Cattle Fund No. 16, Western Trio Cattle Fund No. 17, Western Trio Cattle Fund No. 18, Western Trio Cattle Fund No. 19, Western Trio Cattle Fund No. 21, Western Trio Cattle Fund No. 22, Western Trio Special Option Fund A, Western Trio-B, Western Trio Special Option Fund BN, Western Trio Special Option Fund C, Western Trio Special Option Fund D, Western Trio Special Option Fund F, Western Trio Special Option Fund H, Western Trio Special Option Fund K, Western Trio Special Option Fund M, Western Trio Special Option Fund N, Western Trio Special Option Fund O, Western Trio Special Option Fund P, Western Trio Special Option Fund PC, Western Trio Special Option Fund PC-2, Western Trio Special Option Fund V, Western Trio Special Option Fund VR, Western Trio Special Option Fund W, Western Trio Special Option Fund X, Western Trio Special Option Fund Y and Western Trio Special Option Fund Z.

NO. 82-1435:

Richard S. Lowe, et al. v. Safeway Stores, Inc., et al.

Plaintiffs:

Richard S. Lowe, David Lorch, Percy Zylstra, Robert P. Knips, Clarence Kremer, Otto Lorch, Elmer Peters, Harlan D. Peterson, Walter Ranschau, Anthony Strouth, John Strouth and William Strouth, a partnership trading as Strouth Brothers, Bernard Thier, Richard Thier, Carl Winterboer, Charley Zylstra and Robert C. Zylstra, a partnership, and Charley Zylstra & Sons, Inc., an Iowa corporation.

NO. 82-1436:

Wagon Rod Ranch, et al. v. Safeway Stores, Inc. et al.
Trigg Cattle Company, Inc., et al. v. Safeway Stores, Inc., et al.
Seven Rivers Cattle Co., et al. v. Safeway Stores, Inc., et al.
Sagebrush Cattle Feeders, Inc., et al. v. Safeway Stores, Inc., et al.
Mrs. J. V. McAdoo, et al. v. Safeway Stores, Inc., et al.
A. D. Lee, et al. v. Safeway Stores, Inc., et al.
John T. Bean, et al. v. Safeway Stores, Inc., et al.
R. Dirk Agee, et al. v. Safeway Stores, Inc., et al.
Chaparral Cattle Corp., et al. v. Safeway Stores, Inc., et al.
Burke Petersen, et al. v. Safeway Stores, Inc., et al.
John O. Varian, et al. v. Safeway Stores, Inc., et al.
D. W. Lewter, et al. v. Great Atlantic & Pacific Tea Co., et al.

Plaintiffs:

Pecos Valley Feeders No. 1, Pecos Valley Feeders No. 2, Pecos Valley, Inc., Pecos Valley Management, Red River Properties,

Inc., S & L Land and Cattle Co., John A. Scarborough, Service Grain Co., Inc., Seven Rivers Cattle, Edward I. Smith, R. B. Stanton, Sudan Livestock & Feeding Co., Jim Turnbough, M. D. Weber, David White, David White and George Moreland, Bill Winchell a/k/a WIN Cattle Co., J. Troy Woodward, Irving de Cordova, Allen and Welch Adams, Adams Ranch, Allen Children Partnership, Robert N. Allen, Big 7 Cattlefeeders, Inc., Sarah Shepard Bobo, Fred Boston, Henry Boston, T. Coe Branch, Don Burson, Cagle & Love, James V. Campbell, L. B. Campbell, C. E. Carter & Sons, Carter Cattle Feeders, Carter-Kirchoff Feed Yards, Inc., Center Cattle Feeders, Cerrie Cattle Co., C. E. Christian, H. T. Copeland, Cowboy Cattle Co., James G. Cruce, Mark Curry Cattle Co., Dare Lock d/b/a Dare Lock Cattle Co., Gerald Darroh, F. S. Cattle Co., F & S Cattle Co., Don Ferrel, Gary Fletcher, Flying Cattle Feeders, Garrison Cattle, Inc., Given Bros., H. E. Graham, Eva Graham, Hamlett-Carter, Inc., Hammer-Carter, Inc., Otis Harmon, HCK Cattle Co., Inc., J. E. Helm, Reo Hinton, Hughes-Carter, Inc., D. D. & G. Jordan, E. M. Kee, Jr., Kelton-Carter, Inc., King-Carter, Inc., Kiowa Cattle Co., L & L Farms, Lee-Carter, Inc., Jack R. Love, M & M Cattle, MacKenzie Cattle Co., Martin Cattle Co., Inc., Charles B. Martin, Jr., Max Marble, T. C. Meinecke, Moreland-Carter, Inc., Morris-Carter, Inc., Richard Nall, O.K. Cattle Co., Howard Paine, Phillip D. Pinnell, Plainview Cattle Feeders, Plateau Cattle Co., Jana Posey, Jim Posey, James A. Potts, John Rogers, S & S Cattle Co., S.T.S.P.M. & F., Sage-brush Cattlefeeders, Inc., Shepard Cattle Co., Grady Shepard, Pat Shepard, Smith-Carter, Inc., Gerald & Dale Smith, John V. St. Evens, Larry Strugess, Roy Stockett, Victor Stout, Morgan Sturgess, T.L.&H Cattle Co., Tadlock Land & Cattle Co., Inc., Tee Pee Cattle Co., Texico Cattle Co., Inc., Texico Feedlots, Inc., Noah Tipton, Tobert Tipton, Paul Toliver, Triangle J. Cattle Co., Trinchera Cattle Co., Inc., Triple M Cattle Co., Inc., Triple "S" Cattle Co., Tularosa Cattle Co., Tulia Feedlot, Inc., Val Verde and C.E.C., Merlin Weber, Merlin Weber & M.D., Carroll Wiech, Weldon Young, K & C Cattle, B. R. Evans, J. B. Bean, Bills & Ellis Feedlot, Inc., J. P. Bramblett, G. R. Bryan, Charles Cunningham, Jewel Lutich, Louis Lutich, J. V. McAdoo, Jim McNeil, L. D. McNeil, d/b/a J & L Cattle Co., Ernesto Valenzuela, d/b/a Chihiahua Cattle Co., Thomas Waddell, Don Weinacht, Russell Wilbanks, Louis Alaia, Seymour K. Alban, Alp Company, Inc., Jewell Avent, d/b/a Avent Cattle Co., Avent & Avent, Avent & Farris, Avent and Hrbacek, Avent

& Lodin, Avent & Redd, Avent & Tipton, Avent & Tye, B. J. Cattle Co., Valdy Investment Co., V. R. Barnett, B. M. Bevis, Big Dipper Investment Co., Big Ten Investment Co., Bogle Farms, Inc., Margie Boles, Bert Buchanan, Jack Builtup, Johnnie Burson, C & C Cattle Co., Carne Rojo, Inc., Carol Investment Co., Cooperman Cattle Co., Fred B. Corn & Sons, Inc., Gayle Cotten, Cow Lick Cattle Inc., D & P Cattle Co., Dawn Cattle Corp., Carl Day, Jack Deason, Doc Cattle Feeders, Easter Cattle, H. W. "Bud" Eppers, Excalibur Cattle Co., Inc., Farmers Cattle Co., Feco Cattle Co., Feedum, Ltd., Five Star Cattle Co., Fleethaven Investment Co., Four E Cattle Co., Four I Cattle Co., 4-J Cattle Co., Four Star Cattle Co., Ganado Feeders, Mary Lou Glass, Sid Goodloe, Grofat, Ltd., Hall Cattle Co., Inc., Hall Four, Harshey Feed Lot, Inc., Kalman Heider, Charles Hoover, James T. Hull, A. D. Jones Estate Corp., Just Waiting Cattle Co., Kadee Cattle Co., Ketchum Ltd., Beaver & Baker Kerr, Carl Kleuskens, James E. Lankford, Lazy U Cattle Co., Losal, Ltd., M. D. Cattle Co., Markely-Barton-Hill, Matador Cattle Co., David McGee, the Estate of H. H. McGee, Phillip S. McKee, Melrose Cattle Co., Florene Menefee, L. D. Neumayer d/b/a Neumayer Ranch, Noland & Lawrence, J. B. Noland d/b/a Noland Cattle Co., Old Mill Investment Co., Warren Owen, Owens Electric Cattle Co., Peters Cattle Co., Frank Peters, Pruitt & Burney, Pruitt, Burney and Burney, R.W.&W., Ralph Rainwater, Ribeye Investment Co., Runningbrook Cattle, Inc., Sagebrush Cattle Feeders, Sanchez & Avent, Sawtooth Investment Co., Schrimsher Brothers, Inc., Silver Cattle Co., Simpson Brothers, Six-Way Cattle Co., Smith & Avent, Arnold Smith, Star Cattle Co., Sun Valley Cattle Co., T-Bone Feeders, Inc., Tex-Cal Feeders, Inc., Three E Cattle Co., Trojan Cattle Co., Tule Creek Cattle Co., 2 Way Cattle Co., WAF Investment Co., Stephen Warminski, Warren-Alban Cattle Co., Albert Watson, Albert Watson & CE & W, Watson & Eiffert, Watson & Horney, Watson & Wiggins, Watson Feed Yards, Inc., Watson Feed Yards & A & A, Watson Feed Yards, Inc. & C. M. Eiffert, Watson Feed Yards, Inc. & Arch Wilson, III, Lynn Welch, Benny Wilde Children, L. B. Worthan, Zavtig Investment Co., Jim Bean, John T. Bean, Lettunich Farms, Paul Lettunich, Harry O. Watkins, Avenales Cattle Co., Circle Bar Ranches, Diamond Cattle Co., Diamond Land & Cattle, Charles B. Evans, Jr., Peggy D. Evans, Liberty Livestock, McCormick Brothers, James B. Sinton, Norma M. Sinton, U X Livestock Co., William B. Wright, Jr., Linda S. Wright, John P. Wright,

d/b/a Mary's River Ranch, Elias Goicoechea, d/b/a Holland Ranch, Dean Rhoads, Walter Gardner, d/b/a W & C Cattle Co., Hillary Barnes, d/b/a Barnes Ranches, Inc., Bertrand Paris & Sons, S & R Cattle Co., Don and Martha Sims, Leslie Stewart, Chaparral Cattle Corp., Chaparral Cattle Corp., et al., d/b/a NB Cattle Co., Noonan Assoc., Thomas C. Noonan, Jr., Burke Petersen, Yvonne Peterson, d/b/a Eureka Ranch Co., Petersen Cattle Co., John O. Varian and Zera L. Varian, Durward W. Lewter, Melvin K. Dalton, Vonnie Dalton, Val Dalton, Aleta Dalton, Lynn Patterson, Linda Patterson, d/b/a Bar M. K. Ranches, Alma J. Redd, Robert Redd, Lynda Redd, d/b/a the Indian Creek Cattle Co.

NO. 82-1437:

A. L. Black, et al. v. Albertson's, Inc., et al.

Plaintiffs:

A. L. Black

Estate of G. B. "Pete" Buske:

Loy Deanne Styles; Lila Gay Vars; Phila May Weatherly; B. K. Buske; Lila M. Buske, Independent Executrix

Pioneer Cattle Order Buyers, Inc.:

Board of Directors: Don Foster; A. L. Black; Mary Bingham; Redge Priest; Doug Stephenson; Tom B. Simmons, Jr., trustee; Estate of John G. Carrothers

Officers: Don Foster; A. L. Black; Murry Bingham; Redge Priest; Doug Stephenson; Larry Knowles

Hereford Feedyards, Inc.:

Texas Beef Feedyards, Inc., doing business as Hereford Feedyards, Inc.

Texas Beef Feedyards, Inc., a wholly owned subsidiary of AZL Resources, Inc.:

Directors: Maurice F. Strong; Richard G. Brierley; Leonard Hentsch; William L. Holt; Michel LeGoc; Tom F. Marsh; James G. Niven; John M. O'Mara; Donald W. Solmonson; Scott M. Spangler; James W. Witherspoon

Officers: Maurice Strong; Scott M. Spangler; Mel P. Melsheimer; Donald W. Solmonson; Robert D. Josserand; Kenneth M. Gould; Joseph J. Lund; Franklin D. Dodge; Thomas M. Foster; Walter P. Pruitt; H. W. Van Loo

Solano Corporation:

Scott M. Spangler

Prochemco Cattle Company, Inc.:

Prochemco Cattle Company is a wholly-owned subsidiary of AZL Resources, Inc. (whose directors and officers are named

above under Hereford Feedyards, Inc.); Walter P. Pruitt is trustee.

Eureka Cattle Co., Inc.:

Stockholders: Wilbur Gibson; James W. Witherspoon; Paul Engler; John Seiver; A. Warren Owen; Lloyd Olson

Prochemco, Inc.:

Prochemco, Inc., also known as Procor, Inc., is a wholly-owned subsidiary of AZL Resources, Inc. (whose directors and officers are named above under Hereford Feedyards, Inc.); Walter P. Pruitt is trustee.

The following listed persons and/or companies are defendants in some or all of the above-listed cases:

Albertson's, Inc., American Stores Company, f/k/a Acme Markets, Inc., Arden-Mayfair, Inc., Borman's, Inc., First National Stores, Inc., Food Marketing Institute, f/k/a National Association of Food Chains, Food Fair Stores, Inc., Giant Food, Inc., The Grand Union Company, The Great Atlantic & Pacific Tea Company, Inc., Jewel Companies, Inc., The Kroger Co., Lucky Stores, Inc., National Provisioner, Inc., National Tea Company, Safeway Stores, Incorporated, Skaggs Companies, Inc., Skaggs-Albertson's, The Stop & Shop Companies, Inc., Super Valu Stores, Inc., Supermarkets General Corporation, Thriftimart, Inc., Vons Grocery Co., Winn-Dixie Stores, Inc.

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Statutes:

Clayton Act §4, 15 U.S.C. §15 ..... *passim*

IN THE

Supreme Court of the United States

October Term, 1983

No. ———

IN RE BEEF INDUSTRY ANTITRUST LITIGATON
M.D.L. Docket No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

v.

SAFEWAY STORES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A, has been reported. *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir. 1983, *rehearing denied* 716 F.2d 901 (5th Cir. 1983). The District Court for the Northern District of Texas entered judgment in the case, which has been reported. *In Re Beef Industry Antitrust Litigation*, 542 F. Supp. 1122 (N.D. Tex. 1982).

JURISDICTION

The judgment of the Court of Appeals, which is reproduced in Appendix A, was entered on July 25, 1983. A timely petition for rehearing was filed on August 8, 1983 and was denied on September 12, 1983. The order denying rehearing is reproduced in Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

These 19 cases were originally filed beginning in 1975 and subsequently consolidated as M.D.L. No. 248, *In re Beef Industry Antitrust Litigation*. The complaints allege that the defendants, retail chain grocery stores, conspired to fix artificially low the wholesale price for edible beef and to monopolize the beef market in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, seeking injunctive relief and treble damages for injury caused to Plaintiffs/Petitioners' businesses and properties, 15 U.S.C.

§§ 15, 26. The District Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

Plaintiffs sell fat cattle to packers, who in turn sell the meat portion (carcass) to the defendants. Plaintiffs allege that the price the defendants pay to packers for the beef carcass predetermines the price the packers pay the plaintiffs for the entire animal. The packer customarily pays the cattleman the retailers' carcass price for the live animal; the packer makes his costs and profit on processing and selling the remaining non-meat portion of the animal, the "offal" which includes the hide, blood and entrails.

Following this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the District Court dismissed these cases for failure to state a claim upon which relief can be granted. Plaintiffs appealed, and the Court of Appeals reversed and remanded. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied* 449 U.S. 905 (1980). Based upon the Court of Appeals opinion, remand proceedings concerned solely the "pass-on" issue. September 15, 1981, defendants filed a motion for summary judgment, which the District Court granted on July 14, 1982. On appeal, the Fifth Circuit Court of Appeals, affirmed the District Court.

The evidence considered to be overwhelming by the District Court consists entirely of affidavits of packers who deny that they rigidly, lock-step pass on the carcass price. No packer affidavit asserts that packers absorb any part of the depressed carcass price given by retailers. No packer has sued the defendant retailers for price fixing. There is no possibility of double recovery from these suits.

STATEMENT OF THE FACTS

1. Parties

Plaintiff cattlemen are the primary producers of this country's largest food industry item—beef. Cattle are bred and raised on farms, ranches and commercial feedlots. Plaintiffs produce fat cattle:

> ". . . standardized cattle which have been placed on a high-energy feed for fattening to an optimum weight for sale; the benchmark for fat cattle is U.S.D.A. Choice Grade 3. The term is sufficiently well known and the cattle sufficiently fungible for the Chicago Mercantile Exchange to have a commodities contact for "fat cattle"."

In re Beef Industry Antitrust Litigation (Packer Cases), 607 F.2d 167, 178 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).

Defendants are the nation's twenty-five largest retail food chains, who purchase beef from packers and slaughterers to supply the retail beef to the consuming public.

Also named as defendants are the retail food chains' national trade association and the publisher of the beef industry's price reporting mechanism, the National Provisioner. The National Provisioner publishes a daily market report, the "Yellow Sheet", which shows the price for carcass beef on any given day. This document is used by packers and retailers as the basis for the price paid by retailers to packers for carcass beef, the packers in turn use this price as the price they pay for live cattle.

2. Wholesale Beef Industry's Operation

Plaintiffs allege that the two largest retail food chains, A&P and Safeway, establish the wholesale price of beef unilaterally, through market dominance, custom and agreement in the industry. A&P and Safeway buy carcass beef on Tuesday and Wednesday of each week and are the only significant purchasers in the market on those days. These prices are reported by the National Provisioner in the Yellow Sheet as the wholesale beef price. Each of the other defendant retail food chains purchase beef at wholesale based upon the Yellow Sheet price established by A&P and Safeway. These retail defendants contract in advance for carcass beef with packers, the contract price being determined by an agreement upon a certain day's issue of the Yellow Sheet. The agreed upon date was usually Tuesday and Wednesday, sometimes Thursday.

Government studies indicate that during the mid-1970's from seventy to ninety percent of the carcass beef sold at wholesale to the retail defendants was sold under this formula pricing mechanism. Sales to A&P and Safeway account for most of the remaining carcass beef sold.

3. Yellow Sheet Cattle Pricing

The Yellow Sheet beef reporter's call sheet shows the beef market is "made" daily by calling eleven major packers. In all major cattle feeding areas east of the Rocky Mountains, the beef prices reported in the Yellow Sheet are used as the basis for the live price offered for fat cattle by all packers.

Cattlemen have noted a direct relationship between the rise and fall of live prices and the rise and fall of the Yellow Sheet price. In fact, IBP, by far the largest beef packer, radios the Yellow Sheet prices to its buyers as the prices are received through telephone conversations with Yellow Sheet reporters.

In December, 1978, the United States Department of Agriculture, Agricultural Marketing Service, Packers and Stockyards Program issued a "Beef Pricing Report". Carlot sales of steer and heifer carcasses were chosen for study because most price information is based upon such sales. USDA employees interviewed persons from 35 packing plants representing 26% of the federally inspected steer and heifer slaughter for all firms in the United States in 1976. These plants account for a majority of carlot beef trading. The report concluded that 70% of all steer and heifer carlot carcass sales of the 35 plants were formula sales based on Yellow Sheet published prices. The report further stated that interviews at the 35 plants indicated that the Yellow Sheet is the principle guide used in determining the bid price in the purchase of live cattle by slaughtering packers.

4. Packing Industry's Operation

Packers purchase fat cattle from cattlemen essentially on two bases:

a. *Live Buying:* where the packer-buyer will offer a per pound live weight date-of-sale price determined at the feedlot after estimating the cattle's yield-grade basis after slaughter; and

b. *Yield-grade on date of kill:* where the packer-buyer will offer a carcass price based on a yield-grade determination after the animal is slaughtered.

In both methods, the packer-buyer is given a ceiling price by his head buyer which he may pay for that portion of the animal which will be carcass beef. The packer-buyer, upon viewing the lot of cattle, determines the live weight by a formula which employs the factors of the estimated carcass percentage weight of the animal, multiplied by the Yellow Sheet price for each of the particular grades.

Russell Walker, IBP's head cattle buyer, testified that he gives buying prices to over 75 cattle buyers working for IBP twice a day. Russell Walker further testified that most of IBP's competitors, including all the major packers, attempt to buy the same grade and yield of beef, and that the base price quoted by IBP to its buyer is for yield grade 3 choice beef. Variations in price for different yield grades and quality grades are based on the quotation for choice yield grade 3. Cattle are generally purchased a pen at a time with the objective of getting 85% choice in the purchase of a pen.

Packer-buyers, including those employed by all of the major packers, have explained the uniformity in price for live cattle by stating that the Yellow Sheet dressed beef price is the ceiling price they can offer. The prices offered by the different packers to cattle producers at the same time are usually the same, and any variance is almost always less than one-half cent per pound. Any variance between live prices on the same pen of cattle offered by different packers can be explained either by an intervening movement of the Yellow Sheet price or by differences in estimating the quality or yield characteristics of the pen by the various different packer-buyers. Plaintiffs' evidence established that the packer buyers are extremely accurate in estimating the grade-yield expectation from live cattle and bids vary by less than one-half of one percent.

The alternative method of purchase, yield-grade on date-of-kill, amounts to an absolute and direct, perfect pass through of the price received by the packer from the retail food chain. In the yield-grade on date-of-kill method, the packer specifies that on the day the cattle are slaughtered and graded, the packer will pay to the cattleman the Yellow Sheet carcass beef price, depending upon the grade and weight of the animal.

While the most prevalent method of buying fat cattle in any of the major fat cattle producing areas of the country is by live weight, between 1973 and early 1978, most packer-buyers, including all the major packer-buyers, have from time to time refused to buy cattle on any other basis than carcass basis, grade-yield per Yellow Sheet on date-of-kill. Most demonstrative of a clear pass-back of the price depression, there have been occasions when the wholesale market declined over a period of time and the packers offered to reserve a place in the kill line on a future date, giving the fat cattle producer the Yellow Sheet price for corresponding quality and yield grade and carcass weight of the slaughtered animal. The price-determining mechanism for each buying basis has been the dressed beef prices quoted in the Yellow Sheet.

5. Live Cattle Industry's Operation

Cattle feeding is confined to 23 states, mostly Iowa, Nebraska, Kansas, Colorado, Texas, Arizona and California. Over 70% of the fat cattle fed in the United States are fed in an area within a 200-mile radius of points on a line between Amarillo, Texas, and Sioux City, Iowa, generally known as the "river points". Main fat cattle concentrations are in the high plains or panhandle area (parts of Texas, New Mexico, Oklahoma, Kansas and Colorado), the Corn Belt area (primarily western Iowa and eastern Nebraska) and the Imperial Valley region of California and Arizona.

Cattle feeding is done primarily in areas where corn or other similar high energy grain can be raised. Cattle are fattened essentially the same way in all cattle feeding areas, by concentrated rations intended to produce cattle graded U.S.D.A. Choice Y-3 or better beef. According to market

studies, over 80% of all fat cattle slaughtered in the United States is U.S.D.A. choice, yield grade 3 or better.

Fat cattle producers usually must sell their product within a 100-mile radius of their feed lot since further transportation leads to adverse market prices and product damage. Fat cattle must be sold in a three week optimum period of readiness or else the cattle will become overfat and much less valuable. Once fat cattle are on high energy rations, they cannot successfully be removed from them. Virtually all fat cattle are purchased by packer-slaughterers from fat cattle producers in three manners: (1) packer-buyers purchase directly from the feedlots; (2) packer-buyers purchase cattle at terminal or auction markets; (3) order-buyers purchase cattle from either the feedlots or the terminal or auction markets for various packers for whom they are agents.

6. Products of the Beef Packing Industry

There are, in essence, two products of the beef packing industry:

a. the edible dressed beef carcass; and
b. the non-edible by-products of the slaughtering process, such as hides, bone meal, blood, intestines, etc., known generally as the "offal".

Because packers uniformly and habitually recover their costs and profits from the offal, the dressed beef portion of the animal is the "by-product" of the packing industry. The packer serves as a funnel between the cattlemen and the retail food chains, through which passes the dressed beef carcass. The packer uses the carcass price established by the retailers as a ceiling price for the price he will pay for the live animal.

There is no price competition for dressed carcasses; the wholesale price is determined by A&P, Safeway and the Yellow Sheet. There is competition in the price the packers receive for selling the various components of the offal or drop. If the market for the various components of offal is good enough, packers will give the cattlemen some more money, on the top of the carcass price, in their effort to bid for the offal. Packers make a profit if they can sell the offal for more than the cost of slaughter (including any premium packers might pay to the cattlemen to get the offal). This also works in reverse. If the offal market is down, then packers will habitually bid something lower than wholesale carcass price, again to make sure they are covering slaughter costs. The offal market is affected by different market factors, in that many offal items are not as perishable as carcass beef, resulting in an ability to store offal items to ride out price declines.

On a temporary basis, packers might adjust the price of live animals to fill up their kill lines. This practice is due to a temporary shortage of the kind of animals needed for slaughter. This variation does not detract from the basic habitual practice of taking the Yellow Sheet wholesale dressed beef price as the top price which will be given for the live animal. Rather, packers temporarily cut into their *offal* revenues if they need animals.

Packers depend upon averages to break even between live animal purchases and carcass beef sales. The habit or custom of packers to use the Yellow Sheet on the date of purchase of the animal, despite the possibility that the wholesale price received from the sale of the dressed carcass will be different some three or more days later when the carcass is finally sold. Packers depend on averages—matching and directly passing

through the price received for the carcasses sold on that day to the price paid for animals purchased on that day. As the Court of Appeals stated in its first opinion, beef carcasses are fungible products. Once cattle are killed and dressed, it is impossible to distinguish between the breed and sex of different carcasses of the same yield grade. Because of the fungibility of beef carcasses, and because packers habitually pay the same price for cattle purchased as they are receiving for carcasses, the wholesale carcass price received will match the basic live price paid over a period of time.

7. "Pass-On" Issue

Plaintiff's summary judgment evidence, and the reasonable inferences that may be drawn from it, demonstrates the following:

Carcass beef, in the context of profits and losses, is a "by-product" of the packing industry, with the profitable "product" being the offal, the portion free from the retail food chains' price-fixing powers. The retail food chains establish the depressed price, paying it to the packers who in turn purchase the carcass beef from the cattlemen, dollar for dollar, with the packers uniformly and habitually making their profits in the separate offal market. Cattlemen are simply selling the carcass beef of the live animal to the retail food chains through conduits called "packers". Likewise, retailers are paying the cattlemen for carcass beef through the same conduit, "packers".

The packers' passing back to the cattlemen monies received from the retail food chains does not have any relationship to packers' profits, or losses, because the custom in the packing industry is to pay only the carcass sale price for the live animal. There is no absorption of the retailers price depres-

sion, for to do so would require, in the mirror-image *Illinois Brick* fact situation, packers to pay an additional increment to the cattlemen to offset the retailers' depression. Evidence of the packing industry's habit and custom in breaking even on the price of the meat comes best from the packers themselves. As stated by Russell Walker, long-time head cattle buyer of IBP, by far the predominant packer in the beef industry:

> The dressed weight price I give my buyers is a price that will enable IBP to break even on the actual cost of the animal—if the dressed market says the same. This means that IBP's kill costs and profits must be made, if at all, on the sale of the by-products—the traditional way in which the packing industry is operated.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN APPLYING THE *ILLINOIS BRICK-HANOVER SHOE* RULE AND ITS EXCEPTION TO SELLERS OF FUNGIBLE COMMODITIES WHO SELL TO PURCHASERS WHO HAVE PRICE-FIXED THE PURCHASING PRICE.

The Court of Appeals over-generalized the holdings of the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), by broadly applying the holdings of those cases to sellers. *Hanover Shoe* held that a manufacturer could not assert a "pass-on theory of damages" defense against a direct purchaser who paid an overcharge. *Illinois Brick* held that an indirect purchaser could not use a "pass-on theory of damages" offensively to recover overcharges paid.

Petitioner-plaintiffs' complaints allege, however, that petitioner-plaintiffs are damaged, not by the payment of overcharges, but by the inadequate price that they received because the market was artificially depressed through the activities of the respondent-defendants, and other unnamed co-conspirators, in violation of the federal antitrust laws. Neither *Hanover Shoe* nor *Illinois Brick* deals with—or even refers to first sellers of fungible commodities into a conspiratorially rigged market for an artificially depressed price. *See Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).

These causes of action pose no apportionment problem because no *overcharge* has been *paid*. The allegations of the Amended and Substituted Complaint assert an artificially depressed market price for fat cattle. In contrast, the problem addressed by this Court in *Hanover Shoe-Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down". The cattlemen, who are selling their perishable product at a conspiratorially depressed price into an artificially depressed market which, in short term is inelastic, can neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into the rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among successive levels of the market itself. The Court of Appeals accurately recognized:

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979).

This Court has recognized the seriousness of monopsony or oligopsony power at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. *Id.* at 542. (Emphasis added.)

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 22.

Therefore, a violation of the antitrust laws by those persons who stand in this key position in the market creates not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick*, but creates an injury which permeates the entire market, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present cause, plaintiffs have alleged that defendants have conspired to restrain trade in the entire market for the production, slaughter and purchase of fat cattle. Defendants have chosen as their tool for the manipulation of this market, the price they have agreed to pay for fresh processed carcass beef produced from fat cattle. Defendants, who occupy a key position in the market, were therefore able to manipulate and to conspiratorially rig the entire market which is inelastic in the short-term and into which plaintiffs were forced to sell their live fat cattle.

While recognizing that plaintiffs claim damage to the market in general and that "[plaintiffs] sold their livestock for less than they would have in the open and competitive market," the Fifth Circuit Court of Appeals held that *Illinois Brick* was of such general application that it applied to circumstances where the market was allegedly manipulated by use of price and where the defendants monopolized and at-

tempted to monopolize said market by use of illegal pricing practices. The purpose of the federal antitrust laws is to regulate and protect competition. *Mandeville Is. Farms v. American C. S. Co.*, 334 U.S. 219, 243 *rehearing denied* 334 U.S. 835 (1947); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 482 (7th Cir. 1980). Surely this Court did not intend *Illinois Brick* to thwart the Congressional scheme of regulation and protection by barring recovery of damages by those persons injured in their business or property where the free market forces are conspiratorially and illegally controlled through the use of illegally depressed pricing.

The beef marketplace in 1890 was essentially no different than it exists today. When the Sherman Act was passed, Congress clearly sought to protect the farmer from the very evils complained of in this case. Subsequently, Congress passed Clayton 4, giving a private remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

Today, the cattleman sells live cattle into the funnel end of a distribution chain, claiming that a remote purchaser, who controls the buying power, has depressed the wholesale price for what that purchaser buys, directly injuring the cattle producer. The intermediary, the packer, is unconcerned about the price he received for the meat, since he merely passes that price back to the cattleman as his cost in the live animal. (In fact, the cheaper the price for the meat, the less the packer has to pay to acquire the offal.) In this context the concerns espoused in *Illinois Brick-Hanover Shoe* do not prevail. Plaintiffs' claims here do not rest "at bottom on some abstract conception or speculative measure of harm." *Blue Shield v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 2546-47, n.11 (1982). In this recent case, this Court re-focused its

attention on the *Illinois Brick-Hanover Shoe* rule, providing additional guidance in applying those concerns to the present action:

> It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property . . . [however] the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause". See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969); *Karseal Corporation v. Richfield Oil Corporation*, 221 F.2d 358, 363 (CA9 1955). In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

102 S.Ct. at 2547-48.

In the present case "the physical and economic nexus between the alleged violation and the harm to the plaintiff[s]"

is direct; it is, in fact, predictable. Likewise, Congress was directly concerned with the tangible economic injury suffered here by plaintiffs when the Sherman Act was originally passed.

The Court in *Blue Shield v. McCready* was concerned at a practical level with ensuring that someone be available to bring an action which would "further certain basic objectives of the private enforcement scheme embodied in § 4." 102 S.Ct. at 2546, n.10. In the present case members of the packing industry have failed to sue the retailers for violations occurring during the relevant period claimed in plaintiffs' complaints. Those claims are time barred. Cattlemen are the *only* private parties available to bring this action and should be allowed to sue to recover the full amount of the illegal price depression in wholesale meat.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANTING OF A MOTION FOR SUMMARY JUDGMENT ON THE "PASS-ON" ISSUE BECAUSE PLAINTIFF-PETITIONERS PROFFERRED EVIDENCE CREATING A MATERIAL FACT DISPUTE REQUIRING A JURY TRIAL.

Even if this Court determines that *Illinois Brick* applies to this case, petitioners submit they provided evidence before the District Court that Petitioners fall within the equivalent of the recognized exception to *Illinois Brick*.

A. The Exception To: *Illinois Brick-Hanover Shoe.*

The court of appeals held that although these cases are controlled by the Supreme Court's decision in *Illinois Brick*, plaintiffs had pleaded themselves within an exception to the *Illinois Brick* rule. *In re Beef Industry Antitrust Litigation*,

600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). The exception allowed was traced through *Illinois Brick* to this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

It is clear from the *Hanover Shoe* and *Illinois Brick* opinions that the exception to the use of pass-on is not solely proof of the existence of a cost-plus contract between parties in the chain of distribution. That example works only in the context of suits brought by plaintiffs upstream in the chain of distribution. Where plaintiffs are suing a remote defendant-purchaser situated downstream in the chain of distribution, alleging that they are selling their product into a rigged marketplace and, thus, receiving an artificially low price for their product, restricting the exception to the cost-plus pass-on situation would make pass-on offensively or defensively impossible to show. The use of a cost-plus contract between packers and retailers in the context of the present case would render logically impossible price-fixing claims by cattlemen against retailers. Obviously the exception to the *Hanover Shoe-Illinois Brick* rule must encompass situations other than "pre-existing cost-plus contracts". That is essentially a portion of the holding by the Court of Appeals in the first appeal:

> As we understand these cases [*Hanover Shoe* and *Illinois Brick*], the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are functional equivalent of the cost-plus contract case.

600 F.2d at 1163. Although the District Court paid lip service to this admonition, a reading of the District Court's opinion

demonstrates that plaintiffs were actually held to a stricter standard: detailed proof that *every* transaction accomplished the same result as a cost-plus contract, i.e., "push-pull-click-click". 542 F. Supp. 1134.

B. The Court of Appeals erred in affirming the District Court, who failed to pose the correct factual issue to be determined by defendants' motion for summary judgment.

In deciding a motion for summary judgment a trial court must of necessity determine the factual questions for decision; and if evidence regarding the answer to the question is in dispute, the question must be put to the jury. The Trial Court undertook this exercise, but asked the wrong question. 542 F. Supp. at 1130-31.

The Trial Court stated the issue thus:

> It follows that the retailers must prove that no genuine issue of material fact exists with regard to the feeders' inability to present cost-plus equivalency proof in a non-complex manner.

542 F. Supp. at 1311. That question could hardly be posed to a jury as framed, and would not address the basic issue even if it could be answered. The correct fact question is: "During the relevant period, did the packing industry absorb any portion of the artificially depressed price for wholesale beef?"

If the plaintiffs produce evidence that the packers did not absorb any portion of the price depression (regardless of the mechanism), they must surely prevail on the motion for summary judgment, unless that evidence is of the speculative nature condemned by this Court. For the following reasons

we believe plaintiffs met their summary judgment burden of producing evidence which, at the least, created issues of material fact.

There is essential fallacy in the district court's insistence on evidence of a "rigid, lock-step" relationship between cattle price and the Yellow Sheet as being necessary to comply with the *Illinois Brick-Hanover Shoe* standards.

The middleman packer must make a margin over his costs somewhere in his operations in order to survive economically. The packer has two ways of doing this: either sell some portion of his product above cost, or reduce costs. Plaintiff's evidence shows, uncontraverted, that the head cattle buyer for the largest packer in the country has stated in 1977 that the traditional way the packing industry operated is to attempt to break even on the carcass, i.e., the carcass is sold at the cost of procuring the animal. The packer has costs of obtaining, slaughtering and processing the animal that must be met in order to stay in business. These costs are met by either selling the offal at a profit or obtaining the animal at a lower cost. Thus one would expect to see the live cattle price to be either at or lower than the Yellow Sheet, even if the packers pursued the second strategy.

All *Hanover Shoe* and *Illinois Brick* require is evidence that the middleman uses some device to protect against absorption of loss from the price-fixed item. Plaintiffs' evidence shows that the packer used the Yellow Sheet for such protection. By analogy to the cost plus situation, the carcass is the "cost" and the offal is the "plus." There is nothing in the case law that requires the "plus" to be "rigid" or "lock-step." Indeed, a middleman could have a variable "plus" and certainly the "plus" might not cover all of his other costs. The essence of "cost-plus" for *Illinois Brick* purposes is in the unvarying

passing of the "cost" part, not in the rigidity or lack thereof of the "plus" part.

The packer does not move cattle through his plant for the carcass, but for the offal. All of defendants' evidence shows that the packer might vary his pricing decisions with respect to cattle depending on supply and demand conditions for offal. This is the traditional and habitual way the packing industry works. This is no more inconsistent with "perfect pass-through" of the price fix than a cost plus contract with a variable "plus" would be. This proof complies with *Illinois Brick* and *Hanover Shoe.*

C. The Retailers' evidence failed to make a prima facie case that the Packers absorbed some portion of the alleged undercharge.

The Court of Appeals affirmed the District Court, finding that the defendants presented evidence that:

> a variety of factors influenced the pricing decisions made by packers . . . it is beyond reasonable factual dispute that the feeders cannot show that the pricing decisions of the packers are . . . "determined in advance without regard to the interactions of supply and demand, 600 F.2d at 1165, or that the . . . habitual use of predetermined formula would enable measurement of the effect on prices for fat cattle or changes in wholesale price." *Id.*

542 F. Supp. at 1311. Accordingly, the District Court held for the defendants, even though they presented no evidence as to whether or not the packers, over any given period of time, actually absorbed any of the illegal depression in the wholesale meat price.

The evidence submitted by defendants indicated that the packers' pricing decisions sometimes wandered from strict adherence to the "Yellow Sheet" price because of five influencing factors: (1) Packer's individual needs, (2) Competition and negotiations for cattle, (3) Estimating cattle characteristics, (4) Conditions of the cattle market, and (5) the By-Product market. 542 F. Supp. at 1311-34.

Without regard to plaintiffs' evidence that these factors resulted in *de minimis* changes in the packers' bid price, the District Court concluded that because a *perfect* pass-on of the wholesale price might not occur, plaintiffs could not prevail. Petitioners submit, however, that defendants have the burden of showing, *prima facie* at least, that the packers absorbed some portion of the depression in the wholesale meat price when they purchased cattle, *over time*. For indeed, if there is no absorption, there is no injury to the packers and therefore no basis for claiming a duplicative recovery. There is no evidence of absorption by packers in the record.

To the contrary, plaintiffs presented evidence that the packing industry traditionally ("habitually") breaks even on the meat, covering costs and profits from the "offal" market. The price influencing factors seized upon by the District Court, thus, relate not to the meat, but to the drop, the "plus" in this "functional equivalent" to a "cost-plus" contract.

D. The Court of Appeals, in affirming the District Court, erroneously ignored evidence submitted by plaintiffs which created, at the least, material factual disputes.

Plaintiffs' summary judgment evidence showed that the packing industry, through the consistent and habitual use of a formula applied to the "Yellow Sheet" wholesale beef price, passed on to cattlemen (plaintiffs) that price for the live animal; that the packing industry has traditionally attempted to pay cattlemen an amount for the live animal equal to the amount the packer receives for the red meat; and that the packing industry has traditionally been successful in achieving this result. This evidence included testimony, depositions and affidavits of cattle purchasers, packer buyers, packer owners, economists and others. Not only did the District Court ignore much of this evidence, but the District Court improperly *weighed* the evidence. All inferences made by the court were in defendants' favor, as best exemplified by the speculative excursion taken in pages 29-30 of the Memorandum Opinion. Although the District Court acknowledged the proper summary judgment standards and burden of proof 542 F. Supp. at 1129-1131, it departed from those requirements in analyzing the evidence in this case.

In reaching the conclusion that a packer's individual needs affected pricing decisions, the District Court accepted at face value a portion of Russell Walker's testimony 542 F. Supp. at 1311, but entirely ignored his original affidavit that stated: "The dressed weight prices I give my buyers is a price that will enable I.B.P. to break even on the actual cost of the animal . . . ." In this regard the District Court, likewise, ignored the evidence from Mr. Whorton, the head cattle buyer for Spencer Foods, which established that the packers passed on the money they received for the carcass to the cattlemen

as the total price for the live animal and worked with the offal on the losses and gains. The District Court refused to consider packer and other evidence showing the habitual method of purchasing and the goal sought to be achieved.

In concluding that competition between packers affects their pricing decisions, the District Court accepted at face value the defendants' affidavits from Swift and Sunflower, 542 F. Supp. at 1132, but dismissed plaintiffs' evidence that any variance between packer offering prices on the same pen of cattle can be explained by an intervening movement in the wholesale price or by differences in estimating the quality of the pen of cattle. The court simply disregarded that these differences were *de minimis* in any case. This amounted to the District Court giving all favorable inferences to the moving party which is directly contradictory to this Court's holding in *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The retailers' argument (and the District Court's ruling) assumes that there is a price fix at the wholesale/retail level. The illogic of the District Court's ruling can be demonstrated by asking the question: How can a wholesaler survive under such circumstances, where he is bidding into a free market for his essential supply and then selling his product into a rigged price floor? The cost of obtaining the essential supply (live cattle) is a huge cost to the packer. If the slaughterer purchases 50,000 head of cattle weighing 1100 pounds each at an average of 90¢ per pound dressed, his outlay is $29,700,000. If he can receive only 89¢ from the retailer, he has lost $330,000.

In a short time, under such circumstances, the packer would be forced out of business. During the relevant time, however, packers remained in business. How were they able to do this? Two possibilities exist. Either the wholesale price of beef

moved in response to the live price, or the live price moved in response to the wholesale price, in order to assure that the packer would at least break even.

There is no evidence in the record that the packer established price to the retailer in reference to the live price. Such evidence would have to show a cost based pricing with reference to the live price. In fact, all evidence shows the wholesale price to be determined by reference to the wholesale price guide—the Yellow Sheet. The pricing of wholesale carcasses is shown by interrogatory to be established in advance by a certain day's Yellow Sheet price. An IBP study shows the price of all boxed beef was also established in advance by reference to "Yellow Sheet—Top Half."

Inasmuch as selling price is known in advance to be the wholesale market as quoted in the Yellow Sheet, tolerance by packers of a free market for the essential supply—live cattle—would result in quick bankruptcy.

Thus we have Russell Walker of IBP saying that the price he gives his cattle buyers for live cattle is the price that will enable IBP to break even on the beef, the traditional way the packing industry works. He relies on the Yellow Sheet, because the Yellow Sheet determines the price at which IBP can sell the beef to the retailers. That is the *only* way the packer can avoid a huge loss in the gigantic dollar cost of obtaining cattle.

The evidence shows that the business of the packer is the processing and sale of the "by-product", "offal", or "drop". This is a separate and distinct product which has a separate market. The retailers do not buy the by-product. The packers #1 business revolves around obtaining and processing the offal for less money than is received from its sale. Accord-

ingly, there is some price fluctuation in live price because of competition for the offal.

A packer's kill costs and other overhead are covered by sale from the offal. Hence, the packer might be willing to bid more than the wholesale price to the cattlefeeder in order to get the offal.

There is no evidence that the packer ever bids more for the animals in order to obtain carcasses meat that he will sell to the retailer at a loss. Common sense and the dollars involved in such a possible strategy indicate its essential foolishness and lack of basis in fact.

The only justification for finding a free live cattle market would be a finding that the wholesale market was not rigged. This finding is not even attempted in the District Court's ruling.

Pass-on is simple to prove in this case. There is no evidence in the record that any packer went out of business because he could not obtain live cattle for less than he could sell the beef at wholesale. The reason for this lack of evidence is the industry wide "tradition" of packers to use the Yellow Sheet price to determine live cattle price.

CONCLUSION

For each of the foregoing reasons the petitioners respectfully petition that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the substantial questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

In re BEEF INDUSTRY ANTITRUST LITIGATION—
MDL DOCKET NO. 248.

A. L. BLACK, et al.,
Plaintiffs-Appellants,

v.

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

R. DIRK AGEE, a/k/a Shoshone Indian Tribe of Duckwater, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RONALD BECKER, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

PONY CREEK CATTLE COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

The GREAT ATLANTIC & PACIFIC TEA COMPANY, et al.,

Defendants-Appellees.

RICHARD S. LOWE, et al.,

Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,

Defendants-Appellees.

Nos. 82-1433 to 82-1437.
United States Court of Appeals,
Fifth Circuit.
July 25, 1983.

Appeals from the United States District Court for the Northern District of Texas.

Before REAVLEY and JOHNSON, Circuit Judges, and WYZANSKI*, District Judge.

REAVLEY, Circuit Judge:

This case reaches us for the second time. On the prior appeal, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), (*Beef I*) this court reversed the district court's dismissal on the pleadings of the plaintiffs' claim. Returning to the district court, the defendants once again prevailed, this time on a motion for summary judgment. *In re Beef Industry Antitrust Litigation*, 542 F.Supp. 1122 (N.D.Tex. 1982) (*Beef II*). Plaintiff-appellants return, but we agree with the district court's opinion and affirm.

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* District Judge of the District of Massachusetts, sitting by designation.

FACTS

Plaintiffs are feeders who fatten cattle and prepare them for market. Defendants are, with certain exceptions, retail grocery chains who sell beef to the public.[1] Plaintiffs alleged that defendants engaged in a conspiracy to set wholesale beef prices at artificially depressed levels. Plaintiffs, however, do not sell their cattle directly to the defendants. Instead, the plaintiffs sell to middlemen, the packers, who slaughter the cattle and sell the beef to defendants. Plaintiffs alleged that the packers passed on these artificially depressed prices without absorbing any losses.

This allegation ran into the seemingly insurmountable obstacle of the Supreme Court's pronouncements in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In *Hanover Shoe*, the court held that a defendant may not assert that the plaintiff was not damaged by the defendant's monopoly price when the plaintiff passed on that price to its customers. The court rejected this "pass-on" defense because of the difficulty in reconstructing a company's pricing and output decisions, and because of concerns with overburdening already complicated antitrust actions. In *Illinois Brick*, the court rejected the offensive use by plaintiffs of this pass-on theory. The court relied on a rationale similar to *Hanover Shoe*, but stressed more heavily the potential impairment of the treble damage remedy by the introduction of complicated tracing evidence regarding pricing decisions.

---

[1] The exceptions are one wholesale grocer, a national trade association and the publisher of a beef industry price list, the Yellow Sheet.

Faced with this obstacle, the plaintiffs asserted that their suit fell within an exception for cost-plus contracts mentioned in both *Hanover Shoe* and *Illinois Brick*. The court in *Illinois Brick* explained the exception's rationale:

> The [*Hanover Shoe*] Court allowed a pass-on defense . . . because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser.

431 U.S. at 732 n. 12, 97 S.Ct. at 2067 n. 12.

Plaintiffs argued that certain peculiarities and practices of the beef industry created the functional equivalent of a cost-plus contract. They alleged that the defendants set beef prices that were reported daily in the National Provisioner Daily Market and News Service or "Yellow Sheet," and that the packers then engaged in rigid formula pricing based on the Yellow Sheet. Plaintiffs also alleged that due to the relatively short period of time in which a fattened steer or heifer will achieve and remain at choice grade, the supply of cattle is inelastic, and the plaintiffs are therefore unable to negotiate price or withhold their product.

This court in *Beef I* agreed with plaintiffs in the procedural posture of a dismissal on the pleadings. The court stated:

> [T]he allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would

> have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae would enable measurement of the effect on prices for fat cattle of changes in wholesale prices. The plaintiffs have alleged the functional equivalent of cost-plus contracts.

(footnotes omitted) 600 F.2d at 1165. The court, however, also emphasized that the plaintiffs would be required to present "detailed proof as to individual transactions," *Id.* at 1166.

Plaintiffs' summary judgment proof, however, falls far short of their allegations. The defendant-retailers showed that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983). The defendants' overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision. Specifically, the proof showed that the following factors influenced packers' pricing decisions:

> (1) The packers' individual needs in regard to obtaining a minimum amount of cattle each week. This was necessitated by labor contracts which required that if the packers opened their doors on Monday, they had to pay their employees for the week, regardless of whether they worked.

(2) Temporary local market conditions such as the weather or an over or undersupply of beef. This forced the packers to bid over or under the Yellow Sheet price.

(3) Price competition among the packers.

(4) The beef by-product market (i.e. the sale of hides and nonedible parts of cattle). This market was highly competitive and forced the packers to pay prices over and under the Yellow Sheet price.

Plaintiffs do not seriously contest that these factors did, on occasion, affect the packers' pricing decision. Instead, they assert that at a trial on the merits, the district court should examine evidence of the effect of these factors over time, as opposed to a transaction by transaction basis. Plaintiffs presented affidavit testimony that the packers *attempted* to break even on the beef and recover slaughtering costs and profits from the sale of the beef by-products.

While at first blush this argument may seem appealing, it does not withstand close examination. In *Beef I*, we stressed that plaintiffs alleged that defendants "*strictly* appli[ed] certain formulae to the Yellow Sheet . . . price." 600 F.2d at 1165, and we characterized the packers alleged pricing practices as "rigid formula pricing." *Id.* at 1166. This emphasis on the rigidity and strictness of this formula pricing was not inadvertent. It was mandated by the nature of the cost-plus contract and the Supreme Court's rejection of an exception for cost based rules of thumb in *Illinois Brick*. The nature of a cost-plus contract is such that there is absolute certainty as to the application and the amount of the pass-on. Individual transactions do not have to be weighed to measure whether and to what extent the pass-on occurred. Plaintiffs' averaging theory does not partake of this certainty. As the district court

noted, "[i]f packers averaged out gains and losses, . . . they would absorb some loss on some days." *Beef II*, 542 F.Supp. at 1139 n. 19. To show how much of the loss was absorbed by the packers would be to resort to the sort of speculative evidence forbidden by *Illinois Brick*.

Plaintiffs' averaging theory also runs afoul of *Illinois Brick's* rejection of an exception for "cost-based rules of thumb in setting prices." 431 U.S. at 744, 97 S.Ct. at 2073. To say that *on the average*, packers attempted to pay the Yellow Sheet price for beef is to say that the Yellow Sheet was no more than a rule of thumb. As the Court explained in *Illinois Brick*:

> These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants. (citations omitted). *Id.*

Plaintiffs also invite us to reverse *Beef I* and hold that *Illinois Brick* does not apply. We decline this invitation, because we are bound and, as well, because we agree with it.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Becker v. Safeway Stores, Inc.	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216
Beef Industry Antitrust Litigation, In re	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216
* * *			
Meat Price Investigations Ass'n v. Safeway Stores, Inc.	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216

(Published at 716 F.2d 901 (5th Cir. 1983))

Office - Supreme Court, U.S.
FILED
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CLERK

83-962

No._____

IN THE

Supreme Court of the United States

October Term, 1983

IN RE BEEF INDUSTRY ANTITRUST LITIGATON
M.D.L. Docket No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

v.

SAFEWAY STORES, INC., et al.,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 10, 1983

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APPENDIX

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

M.D.L. Docket No. 248

In re:
BEEF INDUSTRY ANTITRUST LITIGATION

ORDER

In accordance with the attached Memorandum, the motions for summary judgment filed by all retailers are GRANTED.

PATRICK E. HIGGINBOTHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

M.D.L. Docket No. 248

In re:
BEEF INDUSTRY ANTITRUST LITIGATION

MEMORANDUM

Introduction

The task of applying the legal doctrine that forbids both offensive and defensive use of pass-on is presented a second time in this litigation. The prohibition was born of a familiar tension between finite proof and convenience and adjusted by the Supreme Court on the side of convenience. In this task, we are reminded that the relationship of antitrust law and economic theory continues to be a sometime thing suffering from both lack of commitment and an inability (or unwillingness) to communicate, each with the other. The choice of immediate over remote purchasers as preferred claimants, despite its purpose of avoiding undue complexity and speculation, thereby presumably aiding the treble damage suit, has produced a counterproductive result in the hands of the lower courts. The result is that remote plaintiffs claim to be ready to prove a pass-on completely confident that their proof can be sufficiently detailed without freeing the bogeyman of econometrics. Yet, ensnared by adherence to procedural regularity still adjusted for the finite, the goal of reducing complexity is frustrated by the effort spent in deciding if the proof would be unduly complex or speculative. In the long view, this short-term frustration may be the price for the clarity necessary to implement the goal. We will see.

I. Background of the Case

Cattle feeders who fatten and sell cattle to meat packers allege that retail grocery chains[1] conspired to purchase beef

[1] In addition to the retail defendants, one defendant, Super Valu Stores, Inc., is a wholesale grocer; one, the National Association of Food Chains, is a national trade association, and one, the National Provisioner, publishes a beef industry price reporting publication, the Yellow Sheet.

from the packers at artificially depressed prices in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The feeders claim that such depressions in wholesale beef prices were reflected in the Yellow Sheet, a commercial daily beef price reporting service. They allege that the packers applied a fixed formula based on Yellow Sheet beef price quotations[2] to compute the actual prices paid for cattle and that the entire alleged depression was "passed on" to the feeders and not suffered at all by the packers[3] in a manner that functioned as an equivalent to a cost-plus contract. The pass-on was allegedly aided by the fact that cattle kept in feed lots had to be brought to market within a short period to prevent overfattening. The feeders maintain that this claimed inelastic supply of cattle provides the fixed quantity term of a cost-plus equivalency, *see* note 7 and accompanying text *infra*.

Feeders, plaintiffs, do not deal directly with the retailer defendants. Instead, they sell their cattle to packers who slaughter the cattle and convert them into beef and by-products. The packers then sell the beef (i) directly to food retailers, including defendants, or to others at the retail level (*e.g.*, hotels, fast food chains, restaurants, and the government), and (ii) to other middlemen, such as beef jobbers, fabricators and other packers, who may process the beef further and in turn sell it to retailers. Packers do not sell by-products to the retailer defendants. A separate competitive market exists for the by-products.

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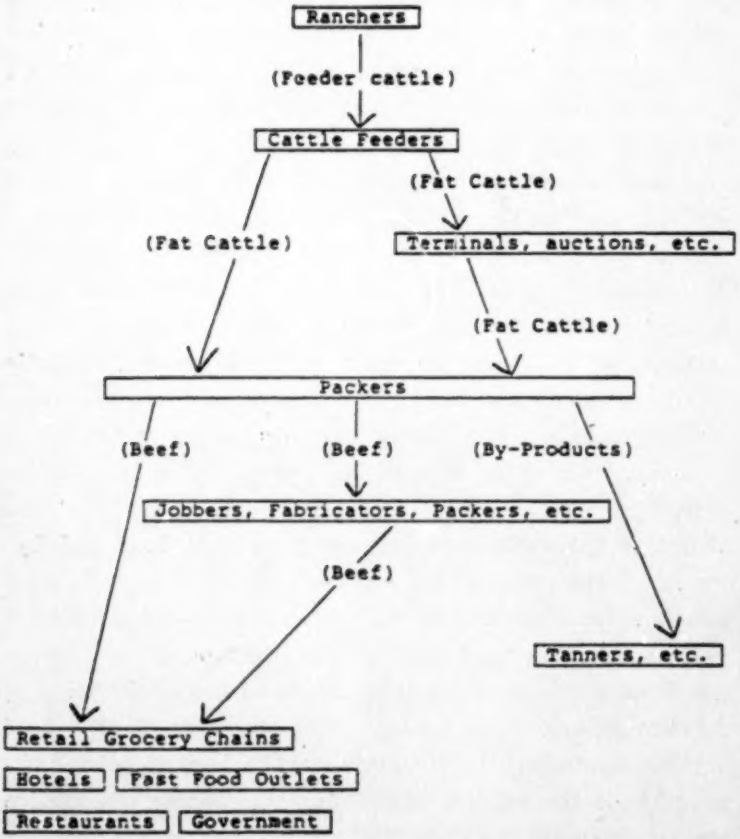
[2] In some regions, the Safeway wholesale price is allegedly used as the basis for the formula.

[3] This case may be characterized as an inverted passing-on situation. That is, the feeders allege that price depressions, not price overcharges, have been passed on to them.

The chain of distribution is as follows:



That the feeders do not sell directly to the retailers poses a high hurdle to their suit against these "indirect" purchasers, a hurdle constructed by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1976). The issue now before this court is whether the feeders can successfully tread the narrow path around this hurdle.

In *Hanover Shoe*, the Supreme Court decided that an antitrust defendant in a suit by a direct purchaser cannot assert a "pass-on" defense, claiming that the direct purchaser passed on any injury from illegal overcharges to its customer, the indirect purchaser.[4] Concerned that the practical utility of private suits as an enforcing mechanism might be diminished by the complexity of proof[5] and that indirect purchasers with

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[4] In *Hanover*, the plaintiff, a shoe manufacturer that leased shoe machinery from defendant United, alleged that United had monopolized the shoe machinery industry by leasing, rather than selling, complicated shoe machinery. United claimed that Hanover suffered no injury because any illegal overcharge in the leasing was reflected in Hanover's charge for shoes it sold its customers.

[5] The Court stressed:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. 392 U.S. at 492-93. (footnote omitted).

"a tiny stake in the lawsuit" would not have the incentive to sue, the Court rejected the pass-on defense. 392 U.S. at 494.

Having rejected the defensive use of passing on with one exception, *see* page 5 *infra*, the Court in *Illinois Brick* confronted its reciprocal and rejected the offensive use of a pass-on theory by an ultimate consumer against a remote seller.[6] The Court noted that allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability, 431 U.S. at 730, and that the offensive use of pass-on would present even more serious evidentiary complexities and uncertainties than its defensive use. *Id.* at 732.

Both *Hanover Shoe* and *Illinois Brick* recognized a narrow exception to the pass-on bar: "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ."[7] 392 U.S. at 481.

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[6] In *Illinois Brick*, the State of Illinois and 700 local government entities sued the manufacturer, Illinois Brick, alleging that illegal overcharges by the company were passed on to them by contractors who used the bricks in building state facilities.

[7] A cost-plus contract has these elements: (1) a pre-existing contract, (2) specifying a fixed quantity of products to be sold, (3) with the price per unit to be determined by an agreed-upon markup to the seller's own cost. Recent Development, *A Door in the Illinois Brick Wall—A Functional Equivalent to the Cost-Plus Contract Exception*, 33 Vand. L. Rev. 481 (1980). When parties agree to a cost-plus contract, the indirect purchaser's price can be easily determined arithmetically once the middleman's costs are known. The middleman is not at risk and neither profits nor loses when the cost to him changes. Rather, he increases or decreases the charge to his customer without ever absorbing a loss or gaining a profit.

Because the price is fully negotiated in advance of any transactions under a cost-plus contract, (i) the middleman need not make any judgments about supply and demand or other changeable conditions in the market; (ii) the middleman's price does not react to the pressures of competition; and (iii) the price does not change as the result of day-to-day negotiation with his cus-

See also 431 U.S. at 736. In that situation, the uncertainty of proof and the risk of multiple liability are demonstrably absent. *Id.*

Believing *Illinois Brick* controlled, Judge Taylor of this court before whom this MDL case was then pending dismissed the feeders' suits against the retailers. The court of appeals reversed, concluding that the complaints stated a claim within the "cost-plus" exception, or more precisely, that the feeders claimed a "functional equivalent" to a cost-plus contract. *See In re Beef Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). It explained:

> The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the

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tomer. Finally, in a cost-plus contract, the relationship between the selling price and the costs to which it is tied will always remain fixed.

The Supreme Court allowed the pre-existing cost-plus exception because it did not give rise to difficulty of proof or damage tracing problems and ensure that the entire injury was passed on to the indirect claimant:

> [T]he pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser. 431 U.S. at 732 n.12.

particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formula would enable measurement of the effect on prices for fat cattle or changes in wholesale prices. . . . It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the wholesale price for carcass beef. Assuming the allegations of the complaints to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

600 F.2d at 1165.

The court of appeals decision was made in the procedural context of reviewing a successful rule 12 frontal assault by the retailers. Unbridled by an evidentiary record, the feeders were most optimistic in their statements to the court of appeals of their intended proof. While generously credulous, the court of appeals invited the retailers to raise the pass-on issue in the more disciplined mode of a motion for summary judgment. Not surprisingly, the invitation has not been ignored. [Equally anticipatable, the hoped-for proof of the feeders' counsel and reality have parted company.]

II. Summary Judgment Standards and Burden of Proof

Following its statement that the "defendants will have the opportunity to raise [the pass-on issue] by summary judgment motion," the fifth circuit directed:

> Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages.

600 F.2d at 1166-67. The retailers assert and the feeders conceded at oral argument that under the fifth circuit opinion, the feeders "may proceed to trial only if they now demonstrate with certainty that the packers were immune from the interactions of supply and demand and purchased cattle in a manner, functionally equivalent to a cost-plus contract, that guaranteed in every instance that the entirety of any alleged depressions in wholesale beef prices was always passed back to plaintiffs." *See* Defendants' Summary Judgment Memorandum at 5. In particular, the retailers maintain that the fifth circuit required that the feeders prove (recast in the procedural context of rule 56, the retailers are entitled to prevail if they show there is no genuine issue of fact but that the feeders cannot show:) (a) that the packers rigidly applied predetermined fixed formulas to the Yellow Sheet beef price quotations or the Safeway wholesale beef price in purchasing cattle; (b) that the packers applied the formulas consistently and without deviation over a long period of time; (c) that the packers had no reason to depart from their purchasing formulae in the short term because fat cattle supply is highly inelastic; (d) that the packers did not absorb depressions in beef prices; (e) that the purchase prices were

set without negotiation and without regard to the interactions of supply and demand; (f) that the difference between the price actually received and the price that would have been received without formulae pricing can be shown with adequate certainty; (g) that a change in wholesale beef quotations as reported on the Yellow Sheet had a precisely calculable and pretermined effect on the actual prices paid to the feeders; that is, once the Yellow Sheet price was known for any day, the price paid for cattle was completely determined; and (h) that there is detailed proof as to individual transactions.[8]

The retailers argue that the fifth circuit's decision explicitly requires that the feeders' proof be clear, unequivocal, simple, non-inferential and direct, just as if a cost-plus contract existed covering each transaction in issue. Finally, the

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[8] For each of the claims (a) through (h), retailers rely on specific language from the fifth circuit opinion: (a) & (b) "The packer's habitual use of predetermined formulae would enable measurement of the effect on prices for fat cattle of changes in wholesale prices," 600 F.2d at 1165; (c) "If allegations of structural inelasticity of short term supply and of rigid formula pricing do not bring a case within the cost plus exception for purposes of a motion to dismiss on the pleadings, then the cost plus exception is a narrow one indeed. . . .," *id.* at 1166; (d) "[A] packer's absorption of a loss resulting from a decrease in the wholesale price would be detectable from a change in his purchasing formula. . . .," *id.* at 1165; (e) "[T]he cattlemen . . . are in no position to negotiate prices because they cannot, at least in the short term, withhold their product," *id.* at 1154; (f) "The [Supreme] Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty," *id.* at 1165 n.22; (g) "We must assume, for purposes of the appeals . . . that the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders. . . .," *id.* at 1165 n.21; and (h) The "proposed proof of damages . . . will require detailed proof as to individual transactions," *id.* at 1166.

retailers remind this court that the fifth circuit emphasized that the teachings of *Hanover Shoe* and *Illinois Brick* reject proof presenting economic generalities or evidentiary complexities and uncertainties.

The feeders respond that the pass-on issue should be decided within "the context of traditional summary judgment determinations . . . [and that] the burden is clearly defendants to show that no facts exist upon which a trier of fact could find for plaintiffs on the pass-on issue." *See* Plaintiffs' memorandum in Opposition to Defendants' Motion for Summary Judgment at 7. It is hornbook law that the burden of the movant on a motion for summary judgment is a heavy one:

> Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benefit of all reasonable inferences that can be drawn from it. Finally, facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true.

C. Wright and A. Miller, *Federal Practice and Procedure*: § 2727 (1973). Regarding the burden on the nonmovant, Wright and Miller explain:

> . . . [I]f the movant makes out a prima facie case that would entitle him to a directed verdict if uncontroverted at trial, summary judgment will be granted unless the party opposing the motion offers some competent evidence that could be presented at trial showing that there is a genuine issue as to a material fact. . . . The burden

> is not a heavy one; he simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.

The feeders are correct insofar as they conclude that traditional summary judgment burdens are applicable. *See Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 815 (E.D.N.Y. 1980) (movant had burden on motion contending *Illinois Brick* barred action by indirect purchaser).

Determining the burden of proof under Fed. R. Civ. Proc. 56 is aided by defining the precise ultimate issue posed by the motion. That definitional exercise is necessary because it provides the measure for the materiality of genuine fact issues. The ultimate issue presented here is an *a fortiori* result of *Hanover Shoe* and *Illinois Brick*. In *Illinois Brick*, the Court recounted the "principal basis for the decision in *Hanover Shoe* [which was] the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model. . . .' " 431 U.S. at 731 (citing 392 U.S. at 492). It follows that the retailers must prove that no genuine issue of material fact exists with regard to the feeders' inability to present cost-plus equivalency proof in a non-complex manner. The feeders' responsive affidavits should be "definite and particularized," 600 F.2d at 1167, to show the simplicity of the passing-on proof.[9]

Accepting all of the facts in the feeders' affidavits as true and giving them the benefit of all reasonable inferences, the

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[9] The fifth circuit emphasized:

> The cases as pleaded escape *Illinois Brick* only insofar as they avoid the use of general economic theory tracing the effect of the defendants' price decisions and only insofar as they can be proved, in the damages phase, with certainty.

600 F.2d at 1166.

retailers will have met their burden if they have shown and the feeders have not in a competent manner disputed that the proof of passing-on presents the evidentiary problems that *Hanover Shoe* and *Illinois Brick* sought to avoid. In determining if the feeders' proof is competent, the court notes that "only *reasonable* inferences may be drawn in [the feeders'] favor." *Southway Theatres, Inc. v. Georgia Theatre Co.*, No. 80-7672, slip op. at 14887 (5th Cir. April 5, 1982).

III. The Complexity and Uncertainty of the Pass-On Theory

A. Factors Influencing the Pricing Decision

Unlike a cost-plus contract, a variety of factors influenced the pricing decisions made by packers: individual needs, competition and negotiation for cattle, estimation of yield and grade of cattle, conditions in the cattle markets, and the fluctuation of the by-product market. *See Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 820-21 (E.D.N.Y. 1980) (no rigid formula because a number of market variables affected costs). Stated otherwise, it is beyond reasonable factual dispute that the feeders cannot show that the pricing decisions of the packers are ". . . determined in advance without regard to the interactions of supply and demand," 600 F.2d at 1165, or that the ". . . habitual use of predetermined formula would enable measurement of the effect on prices for fat cattle or changes in wholesale prices." *Id.*

1. Packer's Individual Needs

In planning each day's cattle purchases, a packer considered his inventory and the number of cattle already purchased for delivery in the immediate future. His judgment about the adequacy of his cattle inventory directly affected the price he was willing to pay in the market. As the head buyer for IBP stated:

> If we have a good inventory of cattle and we're not hard-pressed for numbers, then we'll negotiate tougher. If I tell them (our field buyers) we have to have cattle the next day, they will be easier to negotiate with. Walker Testimony at 519.

The packers' need to keep up kill line numbers thus affected pricing. Although the feeders' affidavits maintain that any variation in pricing occurred only on a "temporary basis," they acknowledge that there were occasions in which the packers' need to fill kill lines changed live cattle bids. *See* Affidavit of Brookhart at ¶ 18; Affidavit of Stallings at ¶ 18; Affidavit of Rudder at ¶ 19; Affidavit of Kirkeby at ¶ 18; and Affidavit of Sievers at 5. As one of the feeders' affidavits revealed: "[I]f . . . they need cattle for their kill line, they will vary their bid up or down from the price quoted on the yellow sheet." *See* Affidavit of Vos at 1. Furthermore, packers generally had labor commitments that required them to pay weekly wages whether or not employees were working. The cost of labor was one of their most significant operating costs. Fixed costs inevitably and directly affected the packers' judgment about the prices they could offer for cattle and sometimes forced them to pay cattle prices that produced a loss when measured against anticipated revenues. As one packer explained in uncontradicted testimony:

> One of the most important factors we considered when we determined the number of cattle to purchase and our initial offering prices is that once we opened our plants during a week we had to buy a minimum number of cattle in order to keep production facilities operating. Our union contracts required that if we brought employees to work at the beginning of a week, they were to be paid for 36 hours whether or not they worked. In addition, we needed

> to have cattle to maintain our relationships as a reliable supplier to customers of beef and by-products. Such pressures frequently caused us to pay prices that were higher than current or projected dressed beef and by-product market conditions would warrant and resulted in running our operations at a loss. Affidavit of American Beef and Beefland Int'l. at ¶ 12.

2. Competition and Negotiation for Cattle

The retailers have shown beyond genuine factual dispute that prices for fat cattle were, in some measure, affected by competitive bidding and individual negotiations with feeders. One packer explained:

> The prices we pay for cattle are affected by the prices which our competitors are paying. Sunflower competes with approximately nine other packers in its procurement areas. If they are paying more for cattle than we determine should be our offering price, we will have to raise our price in order to be able to purchase cattle. Very often the competitive pressure has caused us to lose money because feeders "shop around" for the best available price. Affidavit of Sunflower at ¶ 18.

These competitive pressures caused packers to pay different prices for cattle during the course of a single buying day. As the head of cattle procurement for Swift stated:

> It was not uncommon for the buying program to be changed before the day was over, usually by raising our target prices in response to competitive pressures in the market place. If as the day progressed we thought we could obtain the cattle we needed at a lower price, we would reduce the target price for some or all of our buyers. By the same token, if we were having trouble

> buying cattle, we would be forced to raise our target prices. . . . Swift Affidavit of Harvat at ¶ 8.

The feeders respond that any variance between prices offered by different packers was "almost always" less than one-half cent per pound. *See* Plaintiffs' Memorandum at 18. According to the feeders, any variance between live prices on the same pen of cattle offered by different packers can be explained either by an intervening movement of the Yellow Sheet price or by differences in estimating the quality or yield characteristics of the pen by the various packer-buyers, not by any variation from the Yellow Sheet formula. The feeders' own cattle buyer affidavit explains, however, that shortages of cattle caused packer buyers to disregard Yellow Sheet prices in bidding. *See* Affidavit of Gilbert at 2. In times of shortage, competition increased and packers had "reason to depart from their purchasing formulae in the short run. . . ." 600 F.2d at 1165.

Furthermore, the price of a pen of cattle often depended on negotiation between packers and feeders as to the grade and yield of the cattle in the pen. With their assertion that the Yellow Sheet price established a ceiling or maximum price a packer would offer for live cattle, the feeders recognize that negotiation occurred below the alleged ceiling. As one of feeders' buyer affidavits stated, "If at any time we could buy cattle *under* the Yellow Sheet we got a pat on the back." Affidavit of Snodgrass at 1. (emphasis in original).

3. Estimating Cattle Characteristics

Because most cattle were sold to packers on a "live weight" basis, packers had to estimate these factors: (a) the number of pounds of beef that would be produced from the cattle, *i.e.*, the dressing percentage; (b) the carcass weight range of the cattle; (c) the quality grade of beef that would be produced from the cattle; and (d) the yield grade of the beef

that would be produced from the cattle. As one packer explained:

> At least 90 percent of the cattle that we bought were purchased on a "live weight" basis. Our buyers estimated the weight, dressing percentage, yield grade, and quality grade of the cattle before they made their bids. Even minor errors in these estimates significantly affected the revenues we actually received, and thus of profit or loss. Armour Affidavit ¶ 21.

To implement a perfect "pass-on," packers would have to know with certainty the way in which each pen of cattle would convert into beef. One of the retailers' packer witnesses estimated that an experienced buyer would:

> Average within about 1/2 of 1% in their estimates of dressing percentage, and within about 5-10% in their estimates of how a pen of cattle would grade. On particular transactions, even an experienced buyer could be off as much as 4 percentage points in connection with the dressing percentage and as many as 20 percentage points in connection with yield grade. Incorrect estimates often caused errors in the price of individual pens of cattle as much [as] $5.00 per hundred weight. Affidavit of American Beef and Beefland Int'l. at ¶ 19.

The feeders respond to the retailers' "estimation" argument with affidavits stating:

> Cattle buyer's estimates of the various factors of quality grade and yield, average weight and dressing percentages are usually very close to correct when compared to the actual figures derived when cattle are slaughtered. Cattle buyers are *fired if their [in]accuracy is not less than 1%* of actual slaughter figures, and cattle buyers *are given bonuses based on their ability to pay less for the cattle*

> *than the dressed beef is worth.* Affidavit of Brookhart at ¶ 13 (emphasis supplied).

Accepting here, as I must, the feeders' version, I am still left with deviations that travel against *Illinois Brick*, because a cost-plus contract equivalency allows little room for guessing. Directly put, even the best eyes of buyers inject estimation into a claimed formulae pricing process, albeit skilled estimates.

4. Conditions in the Cattle Market

Retailers emphasize that supply and demand operated to move the cattle market, affecting packers' decisions about the prices at which they would attempt to buy cattle. According to retailers, packers considered: (a) the number of cattle received at terminal markets each day; (b) information from their buyers, cattlemen, the USDA, and wire services regarding availability of cattle; (c) competitive activity in the live cattle market; (d) prices paid for live cattle; and (e) the number of cattle sold. The Vice President for Cattle Procurement of John Morrell & Co. stressed the supply and demand factors he considered each day:

> Estimated current cattle supplies constitute one of the most important factors in my pricing decisions. If there is an ample supply of cattle of the kind I want to buy, I am usually able to buy at a lower price than when cattle are scarce. In order to estimate realistic prices for the day, I must estimate supplies, which vary greatly by region and, at least in some areas, by time of year. I consider numerous sources of information to estimate supplies, including various market reports. The most important sources are the reports from my buyers as to supplies in their respective regions. Affidavit of Morrell at ¶ 7.

Approving the cost-plus equivalent as alleged in the feeders' complaints, the fifth circuit noted: "The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of packers is determined in advance without regard to the interactions of supply and demand." 600 F.2d at 1165. In reality, the interaction of supply and demand indisputably did affect the daily beef prices paid by packers. Despite an overall effort to suggest it was not great, the feeders' affidavits concede some effect of supply and demand. As one cattle buyer explained: "All prices were given to me on a dressed basis and I would take that times potential carcass yield to get the live price. Sometimes this would be on the yellow sheet price or it could be *over* or *under* the yellow sheet depending on demand for that day." Affidavit of Shima at 1. (emphasis supplied).[10] Gordon Freie, a cattle feeder conceded:

> The exception to the price being absolutely governed by the Yellow Sheet is in the instance of where there was a temporary shortage of cattle ready for market in a particular region, in which instance, the packer would temporarily bid higher for cattle. Affidavit of Freie at 2.

Suggesting that the effect of supply and demand was not great does not answer the retailers' assertion that a claimed "push-pull-click-click" formula was not at work.

5. The By-Product Market

The cattle sold to packers produces two products: the edible dressed beef carcass and the nonedible by-products such as hides, bone meal, blood, and intestines, known generally as

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[10] *See also* Affidavit of Gilbert at 2. "I can recall other instances of a real shortage of cattle in my area, and a shortage of cattle in the total area that supplied our plant with cattle to f'" our kill requirements that we were told to disregard the 'yellow sheet' and buy cattle the best way we could."

"offal." While the feeders are alleging that there is no price competition for dressed carcasses, they acknowledge without qualification that competition exists in the offal market and that this competition causes the price for live cattle to vary. A number of their feed lot operator and cattle buyer affidavits make this concession. One stated: "If the market for the various components of offal is good enough, the packer will pay in excess of the top of the carcass price, in his efforts to bid for the offal. . . . If the offal market is down, then the packer will habitually bid something lower than wholesale carcass price, again to make sure he is covering slaughter costs." *See* Plaintiffs' Memorandum at 25; Affidavit of Sievers at 4-5. *See also* Affidavit of Brookhart at ¶ 17; Affidavit of Stallings at ¶ 17; Affidavit of Rudder at ¶ 18; Affidavit of Kirkeby at ¶ 18; Affidavit of Raskin at 1; Affidavit of Sand at 1.

If both beef and by-product anticipated revenues are considered in purchasing cattle, a competitive market in by-products effectively covers any alleged pass-on. At the least, the injection of an independent market makes detection of the completeness of pass-on most difficult. To prove a 100 percent pass-on of the alleged undercharge would involve tracing each sale of beef carcass and by-products to find the extent to which each packer absorbed losses in the sale of beef or by-products, or both. It would involve using regression studies or similar techniques. Such complicated and speculative evidence is forbidden by *Hanover Shoe* and *Illinois Brick*.[11]

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[11] The fifth circuit acknowledged that the "proposed proof of damages [in plaintiffs' complaints] is far from simple," but they accepted it as pleaded because it involved "a complexity born of *quantity*." 600 F.2d at 1166. The summary judgment record demonstrates that the proof of damages also presents a complexity born of quality. This complexity *Hanover Shoe* and *Illinois Brick* do not allow.

B. Empirical Data

The empirical studies presented by retailers demonstrate that the Yellow Sheet is not the index of a reasonably precise pricing formula. The court views the empirical data in the context of the motion for summary judgment; to raise a genuine issue of material fact, the plaintiff must respond with specific data, not conclusory assertions. *See In re Municipal Bond Reporting Antitrust Litigation*, No. 80-2013, slip op. at 1719 (5th Cir. April 5, 1982).

1. The Dubuque Packing Company Studies

The first Dubuque study compares the initial prices the Dubuque Packing Company offered each morning at its Dubuque, Iowa plant for certain 800-900 pound (dress weight) choice steers with the prices of comparable steers reported on the Yellow Sheet for the period August 1971 through December 1977. The study reveals that the Yellow Sheet prices were not identical to those offered by Dubuque. Although the graphs plotting price movements suggest a general relationship between the two prices, no fixed relationship exists.

The feeders argue that the Dubuque study is irrelevant to most packer bidding because it involved a company selling a unique product, Kosher beef. Kosher cattle are heavier than regular fat cattle. The live animal weighs about 1200 pounds; dressed it weighs between 800 and 900 pounds (as compared to 600-700 pounds dressed weight for the normal steer). Sid Raskin, a former Kosher packer, stated that during the Jewish holidays Kosher front quarters could bring a $.05 per lb. premium and hind quarters could bring a $.04 per lb. premium. Affidavit of Raskin at 1. Robert Snodgrass, whose experience included employment as a buyer for Kosher packers, stated that "sometimes the packer could give $1.00 or

$2.00 per hundred [weight] (dressed) over the [Yellow] sheet for the Kosher cattle." Affidavit of Snodgrass at 1. The feeders also attempted to discredit the Dubuque study with the affidavit of Glen L. Freie, a cattle feeder:

> Animals yielding the heavy carcasses Mr. Gray [of Dubuque] states he was obtaining (800-900 pounds) would also yield a much *larger percentage of offal*, which would allow the *Kosher packers to bid higher* for the animal. I made a study of 9 selected months of Dubuque records . . . and find that the price received for the offal itself, *would generally account* for the difference between the Yellow Sheet price and the price Mr. Gray was offering . . . Affidavit of Freie at ¶ 7. (emphasis supplied).[12]

The feeders' affidavits suggest that the Dubuque packing study is atypical and cannot be relied upon to support the motion for summary judgment, but retailers have performed an additional study using non-Kosher cattle. This study reached the following conclusions:

> —The Dubuque offering price and the Yellow Sheet quotation were the same on only 74 days out of 1731 days (4%).
>
> —The Dubuque offering price fluctuated between being higher than the Yellow Sheet quotation (68% of the days) and being lower than the Yellow Sheet quotation (28% of the days).
>
> —During each of 35 months, the Dubuque offering price moved both above and below the Yellow Sheet quotations.

[12] The feeders' theory of packer pricing of Kosher beef does not follow from the Dubuque data because that data shows prices offered below the Yellow Sheet as well as above. Moreover, the feeders' theory on its face acknowledges considerable uncertainty and complexity in the pricing of cattle by Kosher packers.

—The difference between the Dubuque offering price and the Yellow Sheet quotation almost always fluctuated during the course of a week. There was only one week during the entire six and one-half year period when the difference did not fluctuate. Defendants' Reply Memorandum at 20.

2. USDA Data

a. Comparison of Yellow Sheet and USDA Live Cattle Prices

To support their claim that there is no fixed relationship between cattle prices and Yellow Sheet quotations, retailers also offer a comparative study of Yellow Sheet quotations and official USDA live cattle price reports. The study was performed by Agri-Commodities, Inc. ("ACI"), an agribusiness management consulting, commodity information and commodity trading advisory service.

ACI used a computer file of carcass beef quotations as reported by the Yellow Sheet and a computer file of live cattle prices as reported by the USDA to compare changes in live cattle prices with changes in Yellow Sheet carcass quotations on the previous day for the period 1970-1979 for five areas: Interior Iowa, Peoria, Sioux City, Omaha, and East St. Louis.

Included in the comparison was every occasion on which there were two consecutive business days for which the Yellow Sheet reported a carcass beef quotation, and, on each of the two business days following the first day's Yellow Sheet quotations, the USDA reported a live cattle price.

The specific carcass beef item used for comparison purposes was choice steer carcasses, 600 to 700 pounds. The specific live slaughter cattle prices used are set out below:

(1) *Interior Iowa*—From January 1, 1970 to September 25, 1972, the prices were for Choice slaughter steers, 1,100-1,300 pounds. From September 25, 1972 through 1979, the prices were for Choice slaughter steers, 1,050-1,150 pounds in early years, and 1,000-1,200 in later years.

(2) *Peoria*—From January 1, 1970 to August 1, 1970, the prices used were Chicago prices for Choice slaughter steers, 1,100-1,300 pounds. From August 2, 1971 to September 25, 1972, the prices were Peoria prices for Choice slaughter steers, 1,100-1,300 pounds. From September 26, 1972 through 1979, the prices were for Choice 2-4 slaughter steers, 1,000-1,200 pounds.

(3) *Sioux City, Omaha and East St. Louis*—From January 1, 1970 to September 25, 1972, the prices were for Choice slaughter steers, 1,100-1,300 pounds. From September 26, 1972 through 1979, the prices were for Choice 2-4 slaughter steers, 1,000-1,200 pounds.

The comparison for Interior Iowa is illustrative. It shows that during the period studied there were 1,991 occasions on which (i) the Yellow Sheet reported a carcass quotation for two consecutive business days and (ii) on each of the two days following the first day's Yellow Sheet quotation, the USDA reported a slaughter cattle price for Interior Iowa.

On 280 of the 1,991 occasions, or 14.1 percent, the Yellow Sheet and live cattle prices remained unchanged from one business day to the next. These 280 occasions occurred sporadically during the ten year period.

On the remaining 1,711 occasions for which there are Yellow Sheet quotations for consecutive business days followed by live cattle price reports for successive days, there was a change in the Yellow Sheet, or the live price, or both. On 800 occasions, or 40.2 percent, one price changed but the

other did not move. On 243 occasions, or 12.2 percent of the 1991 occasions, the Yellow Sheet and the live cattle prices moved in opposite directions. On 668 occasions, or 33.5 percent, the Yellow Sheet quotation change was followed by a live cattle price change in the same direction, but the retailers emphasize that on only eleven occasions, or 0.5 percent of the total, was the Yellow Sheet carcass price change followed by a live cattle price change that was in the same direction and approximated the dressing percentage.

b. Comparison of Regional Markets' Prices for Live Cattle

The retailers note that the USDA data reveals that in different regions of the country, different prices were offered for live cattle for the same time period. The retailers compared the USDA's live cattle prices for Iowa with prices in East St. Louis and Omaha and found no consistent relation between cattle prices in these markets. *See* Defendants' Appendix C, Exhibit 2. These differences among geographical areas undercut the claim that Yellow Sheet pricing is a mechanical formula. The Yellow Sheet quoted a single nationwide price for each of the grades of live cattle and some other factors accounted for regional differences. *See* Defendants' Appendix B, Exhibit 1, Yellow Sheet dated September 25, 1974.

3. The Beef Pricing Report

Feeders refer to the USDA study published in December 1978 entitled "Beef Pricing Report" to support their claim of formulae pricing by packers. Feeders contend that the findings of the USDA study absolutely contradict the retailers' evidence (the affidavits of the meat packers) that shows that many factors other than the Yellow Sheet provide the basis for the purchase price of cattle. The USDA con-

clusions relied upon by feeders are that (a) "70% of all steer and heifer carlot carcass sales of the 35 plants [studied] were formula sales based on Yellow Sheet published price," Beef Pricing report at 5; (b) 30,478 head or 19.9% [of all cattle purchased on a dressed weight basis] were bought on a formula based on a future Yellow Sheet published price (usually day of slaughter)," *id.* at 15; and "the study confirmed that the wholesale beef price quotation published by the Yellow Sheet is the principal guide used by the selected packers in issuing daily price instructions to cattle buyers," *id.* at 8. A review of the report places those statements in context.

The report focused on beef pricing activity in July, 1977 because that month showed more fluctuation than others up to the time of the study. Carlot sales of steer and heifer carcasses were chosen for the study because most pricing information is based upon such sales. USDA employees interviewed head buyers from 35 packing plants representing 26% of the federally inspected steer and heifer slaughter for all firms in the United States in 1976.[13] These plants, 22 out of a total of 40 in the United States, were located in the major fed beef producing areas from the River Region—comprised of North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Kansas, and Missouri—and the Southwest region, comprised of Texas and Oklahoma.

The principal purpose of the study was to investigate and report on meat pricing practices of packers and the meat price reporting practices of packers. Thus, the study focused

[13] The USDA also collected data from 8 brokers, 3 market reporting services and 8 packers with activity in the fed cattle futures market holding 50 or more August contracts as of July 1, 1977. Beef Pricing Report at 14.

on packer pricing to retailers, slaughterers and processors, not on livestock procurement practices.

In the investigation of packer procurement, only purchases made on a dressed weight basis were analyzed to determine how many were formula priced. Beef Pricing Report at 15. Those purchases constituted 25.4 percent of livestock procured for slaughter, live purchases and transfers from packers' feeding operations constituting the remaining 75.5 percent. *Id.* at 14. The study concluded that of a total of 152,961 head purchased in July 1977 on a dressed weight basis, 30,478 head or 19.9% were bought on a formula based on a future Yellow Sheet published price, usually day of slaughter.[14] *Id.* at 15.

Dividing the number of all cattle slaughtered in July 1977, or 625,276, by the 30,478 head that were purchased by "formula" yields 4.9 percent. That is, 4.9 percent of the total slaughter was purchased on a dressed weight basis based on a future Yellow Sheet price.[15] *See* Deposition of William V. Carroll at 85.

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[14] The term "formula" for purposes of the study meant that the price was left open at the time of agreement to sell cattle and was established by the quotation of a meat reporting service, usually at a later date. *See* Deposition of William V. Carroll at 90. (Mr. Carroll is Division Director of the Packer and Poultry Division, Packers and Stockyards Administration, USDA. He collated the data from the investigation and wrote the Beef Marketing Report).

[15] Mr. Carroll, Division Director of the Packer and Poultry Division of the USDA, concluded that there was "no way" to "determine which of the cattle that were purchased on a carcass basis tied to a future yellow sheet price were sold later on as beef tied to a yellow sheet price." *See* Deposition of William V. Carroll at 88.

Based on this data compiled by the USDA interviewers regarding cattle purchased on a dressed weight basis, the study concluded that "the wholesale beef price quotation published by the yellow sheet is the principal guide used by the selected packers in issuing daily price instructions to cattle buyers."[16] The report continued, however, that "[s]ome additional considerations in arriving at the exact bid price are operating costs, kill costs, by-product values, and the estimated quality grade and yeild [sic] for a particular lot of cattle."[17] Beef Pricing Report at 8-9. The value of by-products was the second most important consideration. *See* Deposition of William V. Carroll at 142-43. Thus, the Yellow Sheet, though a main consideration, is only one element in the pricing decision. The Supreme Court excluded such cost-based "rules of thumb" when framing the narrow cost-plus exception because "[t]hese rules are not adhered to rigidly . . . [T]he extent of the markup or allocation of costs is varied to reflect demand conditions. . . ." *Illinois Brick v. Illinois*, 431 U.S. 720, 744 (1977). The court notes that the feeders told the fifth circuit that the pricing system was not a rule of thumb system.

4. Summary

The retailers' empirical data remains undisputed. The only contrary suggestions are conclusory assertions that the pack-

[16] The USDA interviewers did not question field buyers but only interviewed head buyers at the plant. *See* Deposition of William V. Carroll at 74.

[17] Mr. Carroll explained that 19.9 percent of the cattle purchased on a dressed weight basis were purchased on a formula *based* on the Yellow Sheet price not *equal* to the yellow sheet price. *See* Deposition of William V. Carroll at 99.

ers habitually adhered to the Yellow Sheet price.[18] Such adherence does not inevitably result in a correspondence be-

[18] The following are examples of conclusory assertions in the feeders' affidavits:

(1) "The Yellow Sheet is used as the basis for all trades between us and the packers, whether the trade is made on grade and yield or live weight." Affidavit of Hitch at 4.

(2) "Over 90% of the time, the price given to cattlemen by packers was absolutely controlled by the Yellow Sheet." Affidavit of Freie at 2.

(3) "[T]he price that I would use to pay for fat cattle was 9 times out of 10 obviously controlled by the movement of the wholesale beef market and or the 'yellow sheet.'" Affidavit of Gilbert at 1-2.

(4) "The habitual practice of the packing industry is to match the wholesale price paid by the retailer or fabricator to the beef slaughterer, to the price paid by the slaughterer for the live animal. . . . [T]he packers habitually average out the costs of procuring the animal against the price received for the dressed beef carcass, and break even on the average." Affidavit of Sievers at 1-2.

(5) "[I]t always seemed to me that if there was a depressed market or continuously falling prices, that the only way a buyer would bid on my cattle was in the beef based on the yellow sheet." Affidavit of Bertram at 1.

(6) "It seems to me that it is getting harder all the time to get anything but a dressed beef bid from the packer buyers." Affidavit of Utesch at 1.

(7) "As a rule of thumb nowdays [sic], the buyer will bid you a dressed beef price the day he bids or the day of kill." Affidavit of Heiller at 1.

The one affidavit presenting specific data reported an ordinary least squares analysis of the "producer-packer margin" in percentages. The results indicated packers could maintain relatively constant margins without regard to the supply of cattle. The affiant concluded from the data that "packers 'consistently' and 'habitually' applied a formula which maintained relatively constant margins without regard to prevailing market forces." *See* Affidavit of Stuart at 5. By conducting such a study, the feeders have demonstrated that resort to complicated regression analysis is necessary to make their proof. *Hanover Shoe* and *Illinois Brick* forbid such analyses.

tween the Yellow Sheet price and packers' bids because of the factors previously discussed. Hard and unanswered data showing the absence of such correspondence is a telling blow. Cattle buying is an estimation process; the packers estimate grade and yield of the cattle, their inventory needs, the price they will receive for the carcass several days after purchase, and the price they will receive for the by-product. Characterizing the use of the Yellow Sheet as a mechanical formula proves nothing. An habitual use of a "rule of thumb" by packers is nonetheless a rule of thumb.

C. Absorption of Price Depressions by Packers

Because of the varied factors that affect pricing, retailers have demonstrated that there is no genuine issue of material fact regarding whether the feeders can show that the alleged formula pricing prevented packers from sharing any illegally low price. The uncertainty precluded by *Illinois Brick* exists in this case. For example, the existence of separate markets for beef and by-products makes it difficult to determine (absent recourse to math models) the extent to which packers absorbed declines in beef prices by relying on by-product revenues. It cannot be demonstrated "whether (or to what extent)," 600 F.2d at 1166, when packers bought cattle, they absorbed the alleged depression in beef prices or rather absorbed a change in by-product prices. The silence of Judge Wisdom's opinion on the subject is understandable because neither the briefs on appeal nor the oral argument focused on the independent competitive market in by-products. The opinion's sensitivity to the general phenomenon of multiple costs makes that silence the more notable.

It specifically recognized that if a seller has multiple cost inputs, absorption could occur "without leaving any evidence" of its occurrence. "An intermediary, such as a contractor in *Illinois Brick*, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so." 600 F.2d at 1165. It has on remand become clear that multiple sources of revenue make it difficult to determine with certainty what part of any beef price depression was absorbed by packers because undercharges could be absorbed without leaving any evidence.

Absorption of loss by packers would further be demonstrated by the very nature of the cattle market. Even if a Yellow Sheet price were used both by retailers and by packers, the packers purchased several days before selling beef to retailers and could not know with certainty what "price he will receive when he in turn sells," 600 F.2d at 1165 n.22, as the fifth circuit required. The feeders recognize this uncertainty: "The beef slaughterer will pay the same amount for the live animal as he *expects* to sell the dressed beef carcass for in the wholesale market." *See* Plaintiffs' Memorandum at 23-24 (emphasis supplied). If beef prices decline before packers sold, they would absorb part of any alleged depression. Feeders cannot demonstrate that "the formulae employed were such that a change in wholesale (beef) prices . . . had a predetermined effect on [cattle prices]." 600 F.2d at 1165 n.21. That is, at best the Yellow Sheet provided today's price as a basis for predicting future carcass prices. The retailers have shown beyond dispute that the retailers cannot demonstrate that there is no risk of double recovery. Packers

plainly absorbed some loss.[19] At the least, a demonstration that they did not would require a forbidden excursion.

IV. Conclusion

Not surprisingly, the cost-plus exception of *Hanover Shoe* has been read differently by the lower courts. One description of this difference contrasts the decision of this circuit in this case with the decision of the third circuit in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *See A Legal and Economic Analysis of the Cost-Plus Contract Exception in Hanover Shoe and Illinois Brick*, 47 U. of Chi. L. Rev. 743 (1980). There is a threshold issue that divides the fifth and third circuits. That question is whether there can be an equivalent to a cost-plus contract, given the objectives of *Hanover Shoe* and *Illinois Brick*. As earlier described, the Supreme Court's firm choice of immediate, over direct, purchasers had as its purpose the facilitation of the private damage suit as an antitrust enforcement mechanism. It saw tolerance of overly complex proof and dispersion of allowable plaintiffs as unacceptable impediments

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[19] The retailers' packer affiants emphasized that they paid prices exceeding Yellow Sheet quotations. *See, e.g.*, Documents of H. C. Hitch, Jr. D. Ex. 1.

Feeders respond that packers did not absorb any part of the alleged depression in beef prices when they paid more than the alleged formula-derived price because the "packer temporarily cuts into his offal revenues if he needs animals." Plaintiffs' Memorandum at 25. Yet, whenever packers cut into any revenues because the alleged formula-derived prices were insufficient to allow them to buy cattle, they absorbed at least part of any alleged depression in beef prices.

Feeders further respond that packers suffered no loss because "on average" they recouped their costs. *See* Affidavit of Brookhart at ¶ 19-22; Affidavit of Stallings at ¶ 19-22; Affidavit of Rudder at ¶ 21-24. If packers averaged out gains and losses, however, they would absorb some loss on some days.

to that goal. Ironically, closing the door to the explanatory power and complexity of the tools of the econometrician was consistent with the teaching of basic economic incidence theory. That teaching is that in a monopsony case, apart from cost-plus contracts where the market effectively becomes internal to each contract, the immediate purchaser will not pass on the complete illegal burden absent a perfect model of inelastic supply.

The fifth circuit has decided that a pricing mechanism can be proved that functions in an equivalent manner to a cost-plus contract. Presumably, that equivalency must be demonstrated without resort to the kinds of proof and simplifying assumptions rejected by the very confinement of the exception to a cost-plus type contract. If not, the exception swallows the rule. The Supreme Court's choice of immediate over remote purchasers was perforce bottomed on the assumptions, with the exception noted, that immediate purchasers inevitably suffered injury or contrary proof of this likelihood was intolerably complex. It follows that to establish a cost-plus equivalent pricing mechanism a plaintiff must provide proof that the injury the mechanism inflicts upon the indirect purchaser is separate and distinct from the injury to the immediate purchaser. Otherwise stated, the plaintiff must present proof that the pass-on was complete. Stated more simply, equivalence requires proof in a sufficiently simple form that the immediate purchaser passed-on the complete illegal cost, or as here, the illegal cost reduction.

While it may well be that the fifth circuit opinion seems to assume that approximate inelasticity results in approximate passing-on, a proposition that may be difficult to square with economic incidence theory, a careful reading of the fifth circuit opinion suggests that the gap between it and the

third circuit is in actual effect not so wide, at least not as some commentators suggest. True, the fifth circuit was willing to allow equivalency, but its language was skeptical and the conditions for its demonstration are exacting. Moreover, its tolerance of the effort was born in a procedural context in which it had to indulge the proffered fantasy of the feeders. While squaring functional equivalence with the rulings of the Supreme Court gives me pause, I accept the institutional limits of my role and attempt to apply the decision of my court of appeals; not in a niggardly manner rooted in disagreement, but in full measure as the law of this case. All that has gone before has been that effort.

In conclusion, I point out that it is not necessary even to resort, as I have, to the studies and other data presentations to demonstrate that this market lacks the equivalence required by the fifth circuit, certainly by the Supreme Court.

The feeders urge that the industry pricing mechanism is virtually a non-judgmental mathematical calculation and is, accordingly, the functional equivalent of a cost-plus contract. The argument is constructed upon certain assumptions about the "market." In the attempt to prove a cost-plus equivalency, the feeders argue that fat cattle at market time must then be sold because their controlled diet prepares them for slaughter within a relatively small time window and feeders do not have the option of withholding them from the market. That is, the feeders argue that the supply of cattle is highly inelastic. The result, so it is argued, is that the market allows a functional equivalent of cost-plus contracts in the sense that the middleman's pricing decision need not weigh supply and demand. While not controlled by the contract between the buyer and seller, these decisions, they argue, are frozen by market forces. The argument continues that there was

formulaic and mechanical pricing that allows a post-purchase reviewer to prove that the lowered cost was not shared between the packer and the feeder but was passed-on to the feeders, that a packer would not pay more for fat cattle than he could recoup for the carcass.[20]

The seeming simplicity of this argument ignores the reality that the price of a steer has two components—the carcass and the offal. How much of an illegal price reduction the packer passes on is in part a function of the offal market. If, for example, the carcass price is set at one hundred dollars, a price that represents a ten dollar illegal burden or lowered price, a packer in calculating the amount of his bid for the steer knows that if there is no change in the market by the time he buys, slaughters and resells, he will receive no more than one hundred dollars for the carcass (not the $110 of the free market), plus the expected revenue from the offal which we will assume will be $15, a total of $115. Subtracting his costs, assume 25%, plus a profit of 10%, he should bid no more than $74.75. The feeders' argument assumes both the mechanical (and therefore replicatable) application of such fixed numbers as well as such inelasticity in supply (in

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[20] The feeders have not presented a consistent theory of packer pricing that fits within the cost-plus equivalent exception. During oral argument on a discovery motion in their suit against the packers, the feeders argued that they need access to a study performed by the Commodities Future Trading Commission to help them prove that packers had "sold short" in the cattle futures market to bring down the price of live cattle. The feeders cannot consistently argue that they can prove in a noncomplex manner that packers served as passive conduits through which price depressions were passed and at the same time maintain that these packers manipulated the market to lower the price for cattle. According to the feeders' second theory, the packers no longer are conduits and the price bid for live cattle would be affected by market forces.

the short-run) of fat cattle that the flow through of the $10 was complete, and complete without adjustments in volume of sales.[21]

The true facts are that the packers' calculations of anticipated profit have no such formulaic operation nor have packers shown the inelasticity of the supply.[22] That profit calculation has as a vital component (by the very contention of the feeders) an estimation of return upon the offal. It follows that the packers' bid for fat cattle, while it may well be calculated from an "on the average, relatively accurate" prediction of the return from the sale of the carcass, must accommodate the offal market forces as well as other changing costs. Putting aside that the market price might drop before he sells the carcass, difficult apportionment problems remain.

Finally, the fixity of the formula applied is further softened by the varying marginal costs of the packers. It is undisputed that the packers have high labor costs associated with plant costs and the other usual fixed costs. Fully allocated costs may well be the hypothesized 25%, but the marginal costs for a given pen of fat cattle may be sufficiently small that the packer bid may exceed the Yellow Sheet price. The question becomes, "How do we extricate by application of the feeders' simple arithmetical calculation, the undercharge?" Can we do so without resort to the complexity of marginal

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[21] Because the fifth circuit has suggested that the loss of volume in packer sales is not inconsistent with a cost-plus type of pass through, I will, for sake of this example, assume only a sufficient inelasticity as to allow the packer to gain short-term pricing leverage. It bears observation, however, that changes in the volume of sales and inelasticity are fundamentally at odds.

[22] A three week time frame is not insubstantial, especially when viewed against the packers' competing need to keep their kill lines moving.

cost accounting? More directly, can it be done consistent with the teaching of *Hanover Shoe* and *Illinois Brick*? Can it be done on a transaction-by-transaction basis as distinguished from a post-hoc judgment that such occurred "on the average"? I think not. Instead, viewed most favorably to the feeders, this is a market whose middle level uses rule of thumb pricing. To find that in this market the packers' cattle purchases were the equivalent of a cost-plus contract requires an expansive construction of a narrowly based exception. That expansive view tears at the core of the remedial goals of *Hanover Shoe* and *Illinois Brick* and unnecessarily sets at odds a normative component of antitrust policy and economic theory. Why a court ought to consider doing so is unclear; that it ought not do so is beyond cavil; that I will not is here proved.

PATRICK E. HIGGINBOTHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

M.D.L. Docket No. 248

In re:
BEEF INDUSTRY ANTITRUST LITIGATION

This Document Relates to the Following Actions:
CA 3-76-1238-G (MPIA)
CA 3-76-1248-G (Black)
CA 3-76-1361-G (Becker)
CA 3-77-0360-G (Becker-DC)

ORDER PROVIDING FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND MAKING DETERMINATIONS UNDER 28 U.S.C. § 1292(b)

WHEREAS, the above-listed actions came on for hearing before the Court upon a joint motion for summary judgment on the cost-plus claims joined in by the food retailer defendants, Super Valu Stores, Inc., the Food Marketing Institute and the National Provisioner, Inc., which motion was addressed to the above-listed actions as well as to other actions consolidated with them in M.D.L. Docket No. 248, and upon the unified opposition of all plaintiffs;

WHEREAS, the motion and opposition were duly briefed and heard, and on June 14, 1982, the Court granted the motions for summary judgment;

WHEREAS, the order of June 14, 1982 and accompanying memorandum finally adjudicated all claims in the above-listed actions for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, by reason of alleged violations of the antitrust laws by defendants;

WHEREAS, the aforementioned order and memorandum finally adjudicated all claims of any kind in certain other actions in M.D.L. Docket No. 248, and final judgments of dismissal with prejudice will be entered in such other actions, which judgments will be appealable to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1291;

WHEREAS, in a prior appeal in this docket, the Court of Appeals directed an early determination of plaintiffs' right to invoke the cost-plus exception of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and thereby to enable them instead of packers to pursue antitrust damage claims against

retailers on account of alleged price-fixing in the purchase of beef at wholesale;

WHEREAS, the Court's order of June 14, 1982 and accompanying memorandum constitute the Court's final determination on plaintiffs' claims for damages based on such exception, both in the above-listed actions and in other actions in which similar claims have been asserted;

WHEREAS, the above-listed actions contain claims for injunctive relief, thereby requiring a direction by the Court made pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for the clerk to enter a final judgment;

WHEREAS, it is manifestly in the interests of the efficient administration of justice that all damage claims decided by the Court's ruling of June 14, 1982, should be the subject of simultaneous appeals;

WHEREAS, the Court of Appeals has held in the previous appeal in this docket that the rule of *Illinois Brick* has no application in any event to claims for injunctive relief, so that a subsequent appeal relating to injunctive claims should not involve issues dealt with by the Court's rulings of June 14, 1982;

WHEREAS, this Court further believes that an immediate appeal of all cases covered by the Court's rulings of June 14, 1982, would promote fairness to the parties in allowing full participation of all parties in proceedings in the Court of Appeals, would expedite final resolution of the cost-plus claims and may promote settlement of the remaining injunctive claims;

WHEREAS, the Court of Appeals in other proceedings has indicated that practical, rather than technical, considerations are to govern the application of principles of finality for purposes of appeal and has suggested that, if a trial court desires

to allow prompt appeal of a decision, there are circumstances in which it is advisable not only to order entry of a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure but also, alternatively, to certify the decision under 28 U.S.C. § 1292(b), provided that the requirement is met that there is a controlling question of law as to which there is substantial ground for difference of opinion, and this Court determines that the circumstances exist in this instance for the Court to do so;

WHEREAS, while the Court believes that its rulings of June 14, 1982 are correct and in fact are required in light of the standards established for these actions by the Court of Appeals, this Court is nevertheless of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from this order may materially advance the termination of the litigation; and

WHEREAS, the Court also determines pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that a final judgment should be entered dismissing all claims in these actions by plaintiffs against the defendants for treble damages under § 4 of the Clayton Act;

WHEREAS, the Court further determines expressly that there is no just reason for delay in the entry of such judgment;

NOW THEREFORE IT IS ORDERED:

1. That the Court hereby states pursuant to 28 U.S.C. § 1292(b) that it is of the opinion that the Court's order and memorandum of June 14, 1982, as modified and expanded by this order, involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation;

2. That pursuant to Rule 54(b) of the Federal Rules of Civil Procedure the Court will grant, and the clerk will be directed to enter, a final judgment in the above-listed actions providing for dismissal on the merits as to all defendants of all claims for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15.

PATRICK E. HIGGINBOTHAM
United States District Judge

Dated: July 14, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

M.D.L. Docket No. 248

In re:
BEEF INDUSTRY ANTITRUST LITIGATION

This Document Relates to the Following Actions:
CA 3-76-1238-G (MPIA)
CA 3-76-1248-G (Black)
CA 3-76-1361-G (Becker)
CA 3-77-0360 (Becker-DC)

FINAL JUDGMENT

The above-listed actions came on for hearing before the Court upon the motion for summary judgment on the cost-plus issue joined in by retail defendants, including the Food Marketing Institute, as well as the National Provisioner, Inc. All questions raised by that motion were duly briefed and heard, and an order and memorandum were entered on June 14, 1982, which granted the motion for summary judgment.

These orders finally disposed of all claims in these actions for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. By order dated the date hereof, the Court expressly determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entry of a final judgment on such claims.

NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

1. That final judgment dismissing the above-listed actions on the merits, with prejudice, be and it is hereby granted against plaintiffs as to all claims in these actions for damages by reason of alleged violations of the antitrust laws by defendants; and

2. That the clerk shall enter this final judgment on the civil docket for the above-listed actions.

PATRICK E. HIGGINBOTHAM
United States District Judge

Dated: July 13, 1982.

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No. 83-962

Office - Supreme Court, U.
FILED
JAN 13 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET NO. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

—v.—

SAFEWAY STORES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parents, subsidiaries (other than wholly owned subsidiaries) and affiliates of respondents are listed below.*

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* Amterre Limited Partnership; Ardec Group Inc.; Arnold Pharmacies, Inc.; Australia Safeway Limited; Canada Safeway Limited; Cavenham Holdings Inc.; Cavenham (USA) Inc.; Dinner Bell Meats, Inc.; Farmer Jack Pharmacies, Inc.; Generale Occidentale S.A.; George Weston Limited; H Bar K Processors, Inc.; Henpil, Inc.; Holly Enterprises, Inc.; Household International, Inc.; Household Merchandising, Inc.; Kro-Cap; Loblaws Limited; National Holdings, Inc.; Nutrisearch Company; Ornakarn Ltd.; Pantry Pride, Inc.; Shopko Pharmacies, Inc.; Sugar Creek Packing Co.; Wittington Investments, Limited; Wydiv, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-962

IN RE BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET NO. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

—v.—

SAFEWAY STORES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals in *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir. 1983).

OPINIONS BELOW

The first opinion of the court of appeals, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) ("*Beef I*"), is reported. The

subsequent opinion of the district court, *In re Beef Industry Antitrust Litigation*, 542 F. Supp. 1122 (N.D. Tex. 1982) ("*Beef II*"), which entered judgment in these cases, is reproduced in the Supplement to the Petition. The second opinion of the court of appeals, *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983) ("*Beef III*"), which affirmed the judgment in these cases, is reproduced in the Appendix to the Petition.

STATEMENT OF THE CASE

Several hundred cattle feeders (petitioners herein) have sued 21 food retailers, a wholesale grocer, a retailers' trade association, and a beef industry publication (respondents herein). Petitioners fatten cattle and sell them to meat packers. The packers slaughter the cattle and market them as beef and various by-products. The packers sell some of the beef directly to food retailers, such as respondents. The by-products are sold into numerous other concededly competitive markets. Petitioners do not deal with respondents.[1]

Beginning in 1975, petitioners filed a series of lawsuits, consolidated in MDL 248, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Some of these suits (the "packer cases") allege that meat packers conspired to depress the prices they paid petitioners for cattle. The packer cases are pending before the district court. The nineteen suits that are the subject of the Petition (the "retail cases") allege that (i) respondent-retailers conspired to purchase beef from

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1 For the sake of brevity, respondents are not burdening the Court with a detailed counter-statement of the facts. However, the Petition is replete with mischaracterizations of the record, unsupported statements of fact, and internal inconsistencies. For example, the first question presented (Pet. at i) asserts that "the price received by the [feeders] for the live cattle is the same price paid the packers by the retailers for the beef." But the Petition itself demonstrates, and the lower courts found, that the record does not support this assertion. *See* Pet. at 7, 9, 10-11, 23, 25, 26-27. *See also* pp. 5-6, 13, *infra*.

packers at artificially depressed prices; and (ii) the packers acted as mere robots who automatically and without deviation passed the entire alleged depression in beef prices back to petitioners in the form of lower cattle prices.

A. This Court's Decision In *Illinois Brick*

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that treble damage claims based on price-fixing allegations by purchasers who did not deal directly with an alleged price-fixer were prohibited as a matter of law.[2] The *Illinois Brick* rule is intended to avoid complexities and uncertainties of proof and the risk of overlapping liability stemming from duplicative treble damage actions by direct and indirect claimants. *See id.* at 730-33. The rule is also intended to limit protracted antitrust litigation and its associated judicial burdens. *Id.* at 737-38, 740, 744-45.

Consistent with this underlying policy, the Court recognized a "narrow" exception for an actual "pre-existing" "fixed quantity" "cost-plus" contract. 431 U.S. at 732 n.12, 735-36. Such an exception was allowed because, under a true cost-plus contract, the laws of supply and demand are suspended, the middleman cannot absorb any part of the overcharge, and the entire overcharge will automatically be passed on to the middleman's customer. The Court allowed actions by indirect purchasers where there is such a contract because (1) the contract itself can be proved without difficulty and (2) the contract terms will establish simply, and without resort to speculative, economic or inferential evidence, the absence of *any* absorption of the overcharge at the middleman level. *See id.*

B. *Beef I*

Following the decision in *Illinois Brick*, the district court granted respondents' motion for judgment on the pleadings. In

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2 This rule made treatment of claims and defenses consistent by completing the analysis in this Court's prior decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Beef I, presented with only the pleadings, the Fifth Circuit reversed.

Reasoning that there was no basis for distinguishing between indirect sellers and indirect purchasers under *Illinois Brick*, the court of appeals rejected petitioners' argument that *Illinois Brick* did not apply to these cases because petitioners were sellers, not purchasers. 600 F.2d at 1159. However, the court held that, on the pleadings, petitioners came within the "cost-plus" exception to *Illinois Brick* even though there were no actual "cost-plus" contracts between packers and feeders. More particularly, the court of appeals determined that (i) petitioners had alleged that the packer-middlemen were immune from the interactions of supply and demand, and did not absorb any part of the alleged depression in beef prices, because the prices at which packers purchased cattle were invariably predetermined by the packers' rigid application of fixed formulas to Yellow Sheet beef quotations;[3] and (ii) petitioners claimed that these allegations could be proved simply and without resort to the speculative, economic or inferential evidence barred by *Illinois Brick*. *See id.* at 1163-66.

The court remanded with directions that it should "be determined early in the litigation" whether petitioners could *in fact* so establish the "functional equivalent" of "cost-plus" contracts between packers and feeders, and invited respondents "to raise [the 'cost-plus'] issue again by summary judgment motion." *Id.* at 1166.

This Court denied retailers' petition and feeders' cross-petitions for writs of certiorari. 449 U.S. 905 (1980).

C. *Beef II*

After the litigation was remanded in October 1980, the district court provided a full opportunity for discovery on the "cost-plus" issue. On September 15, 1981, after completion of this discovery, respondents moved for summary judgment.

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3 The Yellow Sheet is a price reporting service that petitioners allege reflected the alleged depression in beef prices.

Petitioners then asked for, and received, a six month period in which to prepare their response, and they then engaged in additional discovery. On June 14, 1982, after all briefs and evidentiary materials had been filed, the district court granted respondents' motion, finding that "the hoped-for proof of the feeders' counsel and reality have parted company." *Beef II*, 542 F. Supp. at 1129.

The court first set forth the burden respondents would have to meet on summary judgment:

> "Accepting all of the facts in the feeders' affidavits as true and giving them the benefit of all reasonable inferences, the retailers will have met their burden if they have shown and the feeders have not in a competent manner disputed that the proof of passing-on presents the evidentiary problems that *Hanover Shoe* and *Illinois Brick* sought to avoid." 542 F. Supp. at 1131.

The court then demonstrated that the complexity and uncertainty of petitioners' pass-on proof mandated dismissal of their claims.

The district court found that petitioners' own evidence demonstrated that "[u]nlike a cost-plus contract, a variety of factors influenced the pricing decisions made by packers: individual needs, competition and negotiation for cattle, estimation of yield and grade of cattle, conditions in the cattle markets, and the fluctuation of the by-product market." 542 F. Supp. at 1131. Thus, the court concluded that "it is beyond reasonable factual dispute that the feeders cannot show that the pricing decisions of the packers are '. . . determined in advance without regard to the interactions of supply and demand' . . . ." *Id.* (citation omitted).

In addition, the court found that respondents' "undisputed" empirical data demonstrated that cattle prices did not move in a fixed relation with Yellow Sheet beef quotations. 542 F. Supp. at 1138-39. Taken together with the factors influencing packers' pricing decisions, these data made clear that, viewed most favorably to petitioners, there was no genuine issue that

packers used the Yellow Sheet, at most, as a rough rule of thumb. *Id.* at 1135-39; *see also id.* at 1140-42.[4]

The district court also found that, because of "the existence of separate markets for beef and by-products":

> "It cannot be demonstrated 'whether (or to what extent),' 600 F.2d at 1166, when packers bought cattle, they absorbed the alleged depression in beef prices or rather absorbed a change in by-product prices." 542 F. Supp. at 1139.

For this reason and others, the court concluded that there was no genuine issue with respect to petitioners' inability to prove that packers passed on the entirety of any alleged depression in beef prices. *Id.*

D. *Beef III*

On July 25, 1983, the Fifth Circuit unanimously affirmed. The court determined that petitioners' "summary judgment proof . . . falls far short of their allegations" of functional equivalency, 710 F.2d at 219, and concluded:

> "The defendant-retailers showed that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. The defendants' overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision." *Id.* (citations omitted).

The *Beef III* panel also rejected petitioners' argument that it should reverse the *Beef I* panel's holding that *Illinois Brick* applies to petitioners' damage claims. *Id.* at 220.

On September 12, 1983, the feeders' petition for rehearing and suggestion for rehearing en banc were denied. 716 F.2d 901.

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4 Petitioners also proffered the U.S. Department of Agriculture's Beef Pricing Report. (See Pet. at 6.) As the district court found, the record evidence concerning this report, including the deposition testimony of its author, further demonstrated that packers used the Yellow Sheet only as rough rule of thumb. *Beef II*, 542 F. Supp. at 1137-38.

REASONS FOR DENYING THE WRIT

Petitioners have cited no "special and important reasons" why this Court should grant a writ of certiorari in these cases. Supreme Court Rule 17. There is no conflict among the Circuits; there has been no departure in these cases from "the accepted and usual course of judicial proceedings;" there has been no decision of "an important question of federal law which has not been, but should be, settled by this Court;" and there has been no decision conflicting with the decisions of this Court. *See id.*

I. THIS COURT'S DECISIONS IN *ILLINOIS BRICK* AND *HANOVER SHOE* RESOLVE ALL ISSUES RAISED BY THE PETITION

At the core of this Court's reasoning in *Illinois Brick* and *Hanover Shoe* was the concern that in the real world, as opposed to the economist's theoretical model, the subtle ways in which market forces affect pricing decisions make it impossible to reconstruct with ease or certainty whether or how a change in the middleman's cost was passed on to its customer or absorbed by the middleman itself. *See Illinois Brick*, 431 U.S. at 725 & n.3, 731-33, 741-43; *Hanover Shoe*, 392 U.S. at 492-93. Thus, the Court observed that efforts to apportion recovery for an alleged injury, absorbed at various tiers in a chain of distribution, add greatly to the complexity, expense and burdens for both courts and litigants, and impair the efficacy of private antitrust enforcement itself. In addition, these apportionment problems create a serious risk of multiple liability. This Court determined that private actions should not be burdened with these apportionment questions. Petitioners would have this Court reintroduce these burdens into antitrust litigation.

A. *Illinois Brick* Applies To Petitioners' Claims

Petitioners contend that the *Illinois Brick* rule should not apply to indirect sellers. But uncertainties and difficulties in

analyzing price and output decisions are equally present whether an indirect plaintiff is a purchaser or a seller. In either case the apportionment of recovery rests on the same theory and calls for the same type of evidence; and in either case it is necessary to prove how prices, sales, costs, and profits would have varied at each level in the distribution chain if the challenged conduct had not occurred. *See Illinois Brick*, 431 U.S. at 725, 731-33, 741-43. Contrary to petitioners' claim (Pet. at 13), a remote seller that is first in the chain of distribution is in the same situation as a remote purchaser such as an ultimate consumer. Neither can "pass-on" the alleged illegal over- or undercharge. No principled distinction can be drawn between a seller and purchaser plaintiff for *Illinois Brick* purposes. The court of appeals therefore held in *Beef I* that:

> "there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases." 600 F.2d at 1159.

Beef I was clearly correct. There is no conflict in the Circuits. Since *Beef I*, not only has the *Beef III* panel agreed, 710 F.2d at 220, but so has the Tenth Circuit. *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).[5]

Petitioners also argue that their seller claims are not pass-on claims because they must sell into a market whose total price level is depressed and, as a result, some cattle feeders whose beef does not reach any of the respondent-retailers may nevertheless be injured by the general reduction in prices caused by

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5 *Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978), does not support petitioners' argument. There, the court held that *Illinois Brick* did not apply where the plaintiff was a *purchaser* who dealt *directly* with a member of a vertical conspiracy. 78 F.R.D. at 443-44. By contrast, here petitioners are sellers who admittedly do not deal directly with respondents.

the alleged violations. The purported difference is irrelevant. Petitioners' "umbrella theory" in no way avoids the need to allocate the over- or undercharge. Since petitioners are indirect claimants, proof of injury must be made for each of them by apportioning the effects of price changes through multiple distribution levels.

Finally, petitioners urge that the rule of *Illinois Brick* and *Hanover Shoe* should be changed to permit indirect plaintiffs to bring suit whenever there may not be strong incentives for the direct plaintiff to sue. This argument was specifically rejected by this Court in *Illinois Brick*. There, the Court acknowledged the possibility that some persons "who may have been actually injured" may not recover and some suits might not be brought at all. 431 U.S. at 746. The Court chose nonetheless to give full sanction to the direct suits and to bar the indirect claims in their entirety. *Id.*

Nothing has happened since the decision of this Court to suggest that the Court was wrong. Petitioners' reliance on *Blue Shield v. McCready*, 457 U.S. 465 (1982), is misplaced. In *McCready*, this Court addressed the issue of "standing" under Section 4 of the Clayton Act. However, *Illinois Brick* made clear, and *McCready* reiterated, that that issue is "analytically distinct" from the "pass-on issue." *Illinois Brick*, 431 U.S. at 728 n.7; *McCready*, 457 U.S. at 476. Moreover, in *McCready*, unlike in these cases, the underlying complexities and difficulties of proof in tracing and apportioning damages were not present. *See* 457 U.S. at 475 n.11.[6]

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6 Petitioners' argument that their claims should be reinstated because the packers are allegedly time-barred from suing respondents makes an indirect claimant's suit dependent upon the passage of the limitations period (contrary to the principle of repose) and upon proof that the direct claimant could have, but did not, file suit. Such a result would require litigants to wait for years to know whether their claims were allowed. Such case-by-case exceptions to the *Illinois Brick* rule should not be countenanced. *See In re Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982), *petition for cert. filed sub nom. California v. Standard Oil Co. of California*, 51 U.S.L.W. 3873 (U.S. May 27, 1983) (No. 82-1938).

The Petition simply seeks to have this Court revisit—without cause—the sound reasoning underlying *Illinois Brick* and *Hanover Shoe*.

B. *Illinois Brick* Bars Petitioners' "On The Average," "Over Time" Pass-On Theory

Petitioners contend that, in the circumstances of these cases, all they must show to escape the *Illinois Brick* bar is that the packers did not absorb any part of the alleged depression in beef prices "on the average," "over time." (See Pet. at 10-11, 23.)

There are no facts in the record that suggest that petitioners could make such a showing. The evidence in the record indisputably demonstrates that petitioners could *never* show that "on the average," "over time" or otherwise packers did not absorb some part of the alleged depression in beef prices. *See Beef II*, 542 F. Supp. at 1139.

In any event, even if petitioners could make such a showing, their argument is wrong as a matter of law. As the Fifth Circuit demonstrated in *Beef I*, and reaffirmed in *Beef III*, the requirements for "cost-plus" functional equivalency that petitioners now seek to avoid were clearly mandated by this Court in *Illinois Brick*. *See Beef I*, 600 F.2d at 1163-66; *Beef III*, 710 F.2d at 220.

Petitioners' "over time," "averaging" argument means that sometimes packers paid above equivalent Yellow Sheet beef quotations, and sometimes below the alleged Yellow Sheet "ceiling." As the courts below demonstrated, and as petitioners do not contest, "[i]f packers averaged out gains and losses, . . . they would absorb some loss on some days." *Beef III*, 710 F.2d at 220, *quoting Beef II*, 542 F. Supp. at 1139 n.19. Accordingly, petitioners' argument (i) runs afoul of this Court's rejection of "cost-based rules of thumb" in *Illinois Brick* (*see Beef III*, 710 F.2d at 220); (ii) is contrary to the *Illinois Brick* holding that, so long as the direct claimant is injured to some extent, it alone has the right of action under

Section 4 of the Clayton Act (431 U.S. at 732 n.12, 745-46); (iii) contravenes the requirement that petitioners show with certainty what actual cattle prices would have been in the absence of the alleged conspiracy (*i.e.*, causation)[7] (*see Illinois Brick*, 431 U.S. at 725, 732-33, 742-43; *Hanover Shoe*, 392 U.S. at 492-93); and (iv) does not avoid tracing and apportionment of damages (*see Illinois Brick*, 431 U.S. at 737-41; *Beef II*, 542 F. Supp. at 1141).

In sum, all petitioners are saying with their "over time," "averaging" argument is that packers behaved just as all businesses without "cost-plus" contracts behave—they acted in the hope that revenues would exceed costs over the long term so that they could remain profitable entities. Thus, the "cost-plus" exception proffered by petitioners would swallow the *Illinois Brick* rule. *See Beef II*, 542 F. Supp. at 1141-42.

C. *Illinois Brick* Bars Petitioners' "Variable Plus" Pass-On Theory

Petitioners also seek to explain away the apportionment problems inherent in their pass-on claims by suggesting that packers priced their cattle purchases "to *attempt* to break even on the carcass" and make their profit and cover their costs from the sale of by-products. (Pet. at 21, emphasis added.) Thus, petitioners claim that the packers' by-product revenues are the "variable 'plus' " in the "cost-plus" equation. (*Id.*) Petitioners then assert that "there is nothing in the case law that requires the plus to be 'rigid' or 'lockstep'." (*Id.*)

As the lower courts properly determined, petitioners are wrong. First, petitioners' contention of a varying markup caused by competition among packers in the by-products markets admits that packers necessarily absorbed losses due to the alleged depression in beef prices. *See Beef II*, 542 F. Supp. at 1139 & n. 19, 1141. Moreover, petitioners' varying markup

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7 Whenever a packer paid below the alleged Yellow Sheet ceiling, petitioners cannot show that the packer would have paid more in the absence of the alleged conspiracy.

theory, which artificially allocates the packers' beef and by-product revenues, was expressly rejected by this Court in *Illinois Brick*:

> "Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. . . . *These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions.* . . . The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants." 431 U.S. at 744 (emphasis added, citations omitted).[8]

Under petitioners' theory, each transaction would have to be scrutinized at trial to reconstruct each sale of beef and by-products and link those sales to each purchase of cattle to try to determine whether packer losses were incurred in the sale of beef, by-products or both. Thus, the difficulties and uncertainties of damage tracing and allocation cannot be avoided in these cases. *See Beef III*, 710 F.2d at 220; *Beef II*, 542 F. Supp. at 1141. Petitioners have provided no reason for this Court to revisit *Illinois Brick*.

II. THIS COURT SHOULD NOT SEARCH THE RECORD TO DETERMINE WHETHER PETITIONERS RAISED A GENUINE ISSUE OF MATERIAL FACT IN CONNECTION WITH RESPONDENTS' SUMMARY JUDGMENT MOTION

The courts below neither weighed evidence nor ignored petitioners' affiants. To the contrary, the courts accepted *petitioners'* version of the facts; it was petitioners' own complex and speculative evidence, and the admissions it contained, that indisputably demonstrated that they could not present "cost-

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8 Petitioners' allocation of beef and by-product revenues is also unsupported by the record and rejected by economic theory. *See Beef I*, 600 F.2d at 1165; *Beef II*, 542 F. Supp. at 1141-42. *See generally* Demsetz, *The Private Production of Public Goods*, 13 J.L. & Econ. 293 (1970); A. Kahn, 1 *The Economics of Regulation* 77-83 (1970).

plus" equivalency proof in the noncomplex manner required by *Illinois Brick* and *Beef I*. *See Beef III*, 710 F.2d at 219-20; *Beef II*, 542 F. Supp. at 1131-39.

Petitioners' summary judgment evidence was replete with admissions that cattle prices resulted from price negotiations between packers and feeders (*Beef II*, 542 F. Supp. at 1133), the demand for cattle (*id.* at 1132, 1134), the supply of cattle (*id.*), each packer's individual needs for cattle (*id.* at 1132), competition among packers for cattle (*id.* at 1132-33), by-products prices (*id.* at 1134, 1138), packer judgments about future price trends in the beef and by-products markets (*id.* at 1139), and individual packer's estimates of cattle characteristics (*id.* at 1133). Respondents' affidavits from all major and many smaller packers agreed that cattle prices resulted from these market forces and others. *See id.* at 1131-34. And respondents' unrefuted empirical data conclusively showed that there was no fixed relation between Yellow Sheet beef quotations and cattle prices. *Id.* at 1135-39.

At bottom, Point II of the Petition requests this Court to become the third court to review the summary judgment record. There is no reason for the Court to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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